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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

WAGGONER CARR,
Defendant-Appellant
vs.
CITY OF ALTUS, OKLAHOMA, ET AL.
Plaintiffs-Appellees

On Appeal from the United States District Court for the Western District of Texas, Austin Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Western District of Texas, Austin Division, sitting as a Three-Judge Court, holding unconstitutional under Art. I, Sec. 8, Clause 3, U.S. Constitution, the provisions in Art. 7477b, a statute of the State of Texas, which provides that no one shall withdraw water from any underground source in Texas for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it.

OPINION BELOW

The opinion of the District Court has not yet been reported. The opinion and judgment are set out in the appendix to this Jurisdictional Statement.

JURISDICTION

Plaintiffs-Appellees, the City of Altus, Oklahoma and C. F. Mock and wife, the latter being owners of the land which overlies the underground water in this suit, instituted this suit and alleged that the District Court of the Western District of Texas had jurisdiction because of diversity of citizenship and an amount of over $10,000.00 in controversy. Plaintiffs-Appellees sought a declaration that the provisions of Texas law under attack (Art. 7477b, V.C.S.) are invalid under the interstate commerce clause, (Art. I, Sec. 8, Clause 3 of the United States Constitution), and asked that Defendant-Appellant Waggoner Carr, the Attorney General of Texas, be enjoined from giving effect to the provisions of Art. 7477b, supra. A Three-Judge District Court was convened to hear the case as required by 28 U.S.C. Secs. 2281 and 2284.

On May 6, 1966, the District Court entered its opinion and judgment holding that the provisions of Texas law under attack (Art. 7477b, V.C.S.), violate the interstate commerce clause of the United States Constitution because said statute constitutes a burden on interstate commerce. The Three-Judge District Court of the Western District of Texas, Austin Division, also enjoined Waggoner Carr as Attorney General of Texas from enforcing the Texas statute under attack in this cause.

On June 30, 1966, Defendant-Appellant, Waggoner Carr, Attorney General of the State of Texas, and the State of Texas, filed with the clerk of the United States District Court for the Western District of Texas a Notice of Appeal to the Supreme Court of the United States. Jurisdiction of this appeal is conferred on the Supreme Court by 28 U.S.C., Sec. 1253.

STATE LAWS INVOLVED IN THE CASE

Article 7477b, Vernon's Annotated Texas Civil Statutes (H. B. 225, Chapter 568, Page 1245 of the Acts of the 59th Legislature, effective August 30, 1965) prohibits the withdrawal of water from any underground source in the State of Texas for use in any other State by means of drilling a well in Texas and transporting the water outside the boundaries of the State of Texas unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it, the said statute as it appears in the above session laws reading as follows:

> "An Act regulating withdrawal of underground water for use in another state by drilling a well in Texas; requiring Legislature consent; providing exceptions; relating to rights of ownership in underground water; containing a severability clause; and declaring an emergency.
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
>
> "Section 1. It is hereby declared to be the public policy of this state, in the interest of domestic, municipal, industrial, agricultural and other beneficial uses and the health and welfare of this State and its people, to conserve and protect all water resources both public and private and prevent waste of such water resources of the State and for that purpose to provide reasonable regulations for withdrawal and transporting underground water outside the boundaries of this State.
>
> Sec. 2. No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized

by an Act of the Texas Legislature and thereafter as approved by it.

Sec. 3. Notwithstanding the generality of the foregoing, the provisions of this Act shall not apply to any city or town in this State the boundaries of which extend into any other state and the municipal water supply is provided by a common distribution system or to any underground water containing more than one thousand, two hundred (1,200) parts per million chlorides or two thousand (2,000) parts per million total dissolved solids.

Sec. 4. This Act does not apply to any city which, before the effective date of this Act, had one or more contracts to supply water to users outside the State.

Sec. 5. This Act does not apply to any individual who transports his own underground water across the boundaries of this State for his own use for irrigation, manufacturing, mining or domestic use as long as no sale is involved.

Sec. 6. If any provision of this Act or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the Act or the application of its provision to other persons or circumstances shall not be effected.

Sec. 7. The ownership and rights of the owner of the land, his lessees and assigns, in underground water are hereby recognized, and nothing in this Act shall be construed as depriving or divesting such owner, his assigns or lessees, of such ownership or rights, subject, however, to the rules and regulations promulgated pursuant to Article 7880-3c, Section D.

Sec. 8. The importance of this legislation creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and the Rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted."

Passed by the House on May 20, 1965, by a non-record vote; House concurred in Senate amendments on May 28, 1965, by a non-record vote; passed by the Senate, as amended, on May 26, 1965, by a viva-voce vote.
Approved June 17, 1965.

Effective August 30, 1965, 90 days after date of adjournment."

QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented by this Appeal:

1. Whether the Federal District Court for the Western District of Texas, should have abstained from exercising jurisdiction until after Plaintiffs-Appellees herein had first applied to the Legislature of the State of Texas for relief.

2. Whether the Eleventh Amendment of the Constitution of the United States of America prohibited this suit by citizens of the State of Oklahoma against the State of Texas.

3. Whether the declaratory relief sought by Plaintiffs-Appellees herein was premature.

4. Whether Section 2 of Article 7477b is unconstitutional and void as being in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

5. Whether Section 2 of Article 7477b is a valid exercise of the police power vested in the State of Texas under the Tenth Amendment of the United State Constitution.

STATEMENT OF THE CASE

In the northwestern part of Wilbarger County, Texas there is an area of approximately 75 square miles known as the *Odell Sand Hills,* same being situated roughly in the shape of a triangle with its south line as a base and the apex lying to the north along a bend in the Red River. Its base from east to west is approximately 10 miles in length and the distance from its southerly base line to its most northerly point is also approximately 10 miles. The most southerly portion of the Odell Sand Hills area is approximately 8 miles north of the City of Vernon, Texas. In the Odell Sand Hills there is a *unique and natural subsurface, water-bearing formation* technically known as the Seymour formation of Pleistocene age which varies in thickness from a few inches to about 120 feet. This formation contains a high quality *percolating ground water.* With the exception of the Odell Sand Hills, there is no economically available ground water within a 50-mile radius of either City of Altus, Oklahoma or of the City of Vernon, Texas which is of such quantity and quality as to be adequate and suitable for municipal purposes for cities of their size. The land of Plaintiffs-Appellees C. F. Mock and wife, Pauline Mock, is located in the extreme north portion of the Odell Sand Hills area.

Article 7477b, Vernon's Ann. Tex. Civ. Statutes, (Sec. 2 of H. B. No. 225, Ch. 568, p. 1245 of the Acts of 59th Leg. of the State of Texas, R.S., effective August 30, 1965) was introduced in the House of Representatives of the State of Texas on January 26, 1965, as House Bill No. 225 by W. S. Heatly. Representative Heatly represents District No. 82 which includes both Hardeman and Wilbarger Counties, Texas. Article

7477b is attached to the Exhibit Stipulation as Plaintiffs-Appellees' Exhibit 13. This statute is set forth in full under "State Laws Involved in the Case," supra.

Plaintiffs-Appellees have never attempted to obtain from the Texas Legislature any permission to transport water outside the boundaries of the State of Texas as provided for in Section 2 of Article 7477b.

The present and only water supply for Plaintiff-Appellee City of Altus is obtained from the W. C. Austin Project of the United States Bureau of Reclamation which is controlled and managed by the Lugert-Altus Irrigation District, a corporate body, and a political subdivision of the State of Oklahoma. This water supply is limited in amount to a maximum of 4800-acre feet each year, and in 1963, Plaintiff City of Altus for the first time used its entire allotment of 4800-acre feet. Attempts by Plaintiff City of Altus to obtain from the Lugert-Altus Irrigation District an increase in its annual water allotment have been unsuccessful since all available water drawn from the Project over and above said allotment is at all times committed to other users for irrigation. If the Federal Government would permit it, the Lugert-Altus reservoir water could be used for the higher use without taking water out of the State of Texas.

The City of Vernon developed a water well field in the Odell Sand Hills area late in 1953. It is located approximately 12 miles north northwest of the City of Vernon in Wilbarger County. The original well field had eleven wells. In 1957, two additional wells were put into operation making a total of thirteen producing wells. In 1961, two of the original eleven wells were replaced due to failure caused by sanding.

Since that time, the well field has provided the necessary water for the City. Although this source of water supply of the City of Vernon from this well field has been adequate for several years, in the future, additional facilities for pumping and distributing the water will be required.

The most northerly wells of the City of Vernon are approximately 4 miles south of the most southerly boundary of the Mock land. Approximately six square miles of the Mock land contains this underground water-bearing formation.

This suit was filed on September 7, 1965, by Plaintiffs-Appellees, the City of Altus, Oklahoma, and C. F. Mock and wife, Pauline Mock, all citizens of Oklahoma, against Waggoner Carr, Attorney General of Texas, Defendant-Appellant, but it is not clear whether Plaintiffs are committed to "suing an individual" or whether they "sue the State of Texas." They have no permission to sue the State of Texas.

On September 24, 1965, Defendant-Appellant filed his Pleas to the Jurisdiction, his Answer subject to these, and later, on October 20, 1965, Defendant-Appellant filed a Motion to Dismiss. By these pleadings, when taken together, Defendant-Appellant prayed for the Three-Judge District Court to abstain from exercising any Federal jurisdiction; that it recognize this suit to be brought in violation of the Eleventh Amendment to the United States Constitution; that it sustain Defendant's claims to prematurity; that it hold Article 7477b to be a valid statute of the State of Texas and a reasonable exercise of the police power of the State of Texas.

I. DISMISSAL AND ABSTENTION GROUNDS

Williams v. City of Wichita, Kansas, 279 F. 2d 375, (10th C.A., 1960), is the rule of abstention applicable to ground waters, for it holds that Federal Courts will not step in and determine rights to underground waters in advance of authoritative action by State courts. Title to the corpus of underground waters in Texas is not in the landowners, or, at the very least, such "ownership" is uncertain. *H. & T. C. Ry v. East,* 98 Tex. 146, 81 S.W. 279 (1904); *City of Corpus Christi v. City of Pleasanton,* 154 Tex. 289, 276 S.W. 2d 798 (1955). Is "absolute" ownership of percolating waters in a landowner, or, is his "title" merely an unvested right to capture and reduce such waters to possession? Right to capture things ferae naturae is always subject to legislative control. *Geer v. Connecticut,* 161 U.S. 519 (1895). *Pleasanton,* supra, fails to decree any unqualified "ownership" of percolating waters to the landowner. This Court cites *Frazier v. Brown,* 12 Ohio St. 294, and holds that "use" of percolating waters can be controlled by the Texas Legislature. Is our Texas statute (Art. 7477b) here under attack valid under *Geer?* This Statute changes common law rules, but also gives recognition to some type of "ownership." Are related Texas statutes, such as Art. 7880-3c, V.C.S., which allow creation of underground water districts, valid laws, or does some "vested" right in percolating water render these laws invalid? Texas Courts should be allowed to answer these questions. Our present Texas decisions are not even as positive as were the Kansas laws in *Williams,* supra.

Assuming, but not admitting, that Texas law recognizes private ownership of underground percolating waters, *Pleasanton* holds this "use" and "capture" is subject to state police power as follows:

> *". . . Undoubtedly the Legislature could prohibit the use of any means of transportation of percolating or artesian water which permitted the escape of excessive amounts, but it has not seen fit to do so. The power certainly does not lie with the courts to assert the legislative function and say what types of conduits and reservoirs may be used for the transportation and storage of water, lawfully obtained and lawfully used. . . ."*
>
> "The Legislature is now in session. It will have this opinion before it before adjournment. It will recognize the problem. If it wishes to declare that the transportation of water in conduits which permit the escape of a large percentage is wasteful and unlawful, it will have ample time in which to do it."

This opinion recognizes without question that the police power can operate on groundwater regardless of title or ownership questions. Enactment of Art. 7477b was exercise of the police power Justice Calvert and the Texas Supreme Court referred to in the Pleasanton case.

It is unquestioned in this case that this particular statute which was enacted and which is the subject of suit has never been judicially examined by the courts of Texas. It is also true that *Williams v. Wichita,* 190 Kan. 317, 374 P. 2d 578, appeal dismissed 375 U.S. 7, reh. den. 375 U.S. 936 had earlier been brought in Federal Court and abstention was the rule used. *Baumann v. Smrha,* 145 F.S. 617; *Williams v. Wichita* (10th C.A., 1960) 279 F. 2d 375.

The *City of Corpus Christi v. City of Pleasanton* case, supra, is authority enough for the Federal Courts to hold that they should abstain from ruling on constitutionality of this State statute until the courts of

Texas have had an opportunity to pass upon the exact nature of the Mock's title to uncaptured percolating ground waters in the light of past case-law.

The statute (Art. 7477b) operates upon and regulates "withdrawal" from the underground water reservoir and the police power can reasonably operate through this particular type of statute. *Williams v. City of Wichita,* 190 Kan. 317, 374 Pac. 2d 578, app. dism. 375 U.S. 7, reh. den. 375 U.S. 936; followed in 391 Pac. 2d 93 (192 Kan. 647, 1964); 11 Kan. L. Rev. 558 (May, 1963); 39 N. Dak. L. Rev. 125 (Jan. 1963); 8 S. Dak. L. Rev. 134 (Spring 1963); *Geer v. Connecticut,* 161 U.S. 519; *Hudson County Water Company v. McCarter, Attorney General of the State of New Jersey,* 209 U.S. 349 (1908); *Baumann v. Smrha,* 146 F.S. 617 (D.C.S.D. New York, 1956), affd. in 77 S. Ct. 96.

II. SUIT VIOLATES ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Defendant-Appellant is well aware of the minutely drawn distinctions applied in certain cases to authorize suits against States of the Union. But we contend these Court-made exceptions are not authorized by the unambiguous words of Amendment XI, to the U. S. Constitution (U.S. Statutes at Large 402, adopted in 1798) which reads:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by Citizens of another State, or by Citizens or Subjects of any Foreign State."

"Commenced" does not take account of whether the cause is meritorious or groundless. How could the

State of Texas and its laws be more involved than in the present case. The prohibition needs no interpretation, *Ames v. Kansas,* 111 U.S. 449. The engraftment of conditions on when and how States may be sued is to follow a shadow of the Constitution and not its substance. The simple command of the U. S. Constitution as a result of *Chisholm v. Georgia,* 2 Dall. (U.S.) 419, 1 L. Ed. 440 (1793) is that such suits will not be "commenced" or "prosecuted" in Federal Courts. Texas constitutional provisions protect property rights without need for State legislative consent to sue. Art. I, Sec. 17, Texas Constitution.

Plaintiffs-Appellees are citizens of Oklahoma and have brought suit against the Attorney General of Texas seeking to declare Article 7477b unconstitutional and to restrain him from enforcing this statute. This suit is an attempt by citizens of the State of Oklahoma to bring suit against the State of Texas in violation of the Eleventh Amendment to the United States Constitution.

It is without question that plaintiffs Mock and wife are citizens of the State of Oklahoma. Likewise, the City of Altus, Oklahoma, is a citizen of the State of Oklahoma for Federal jurisdictional purposes. *Cowles v. Mercer County,* 7 Wall. 118, 19 L. Ed. 86; *Ysleta v. Canada,* C.C. Tex. 1895, 67 F. 6; *Siegel v. City of Detroit, Department of Street Railways,* D.C. Mich, 1943, 52 F. Supp. 669; *Helmsley v. City of Detroit,* D.C. Mich. 1962, 205 F. Supp. 793, Affirmed 320 F. 2d 476.

Before we proceed further, it must be pointed out that under the terms of Article 7477b, the Attorney General of Texas is not given the power to bring suit to enforce the terms of this statute. We can only speculate as to who has the power to institute suit to enforce this statute since the Courts of the State of Texas have not been presented with this question.

When relief is sought against an officer of the State in his official capacity, it is generally regarded as a suit against the state. *Ex parte Ayers,* 123 U.S. 443. Thus, whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties of the record, but by a consideration of the nature of the case. *Ex parte Ayers,* 123 U.S. 443, 8 S. Ct. 164, 31 L. Ed. 223. Where the state, *though not named as such,* is nevertheless *the only real party* against which the relief is asked and against which the judgment or decree effectively operates, then it alone is the real party in interest. *Morenci Copper Company v. Freer,* 127 Fed. 199 (U.S. D.C., S.D., W. Va., 1903).

The case of *Fitts v. McGhee,* 172 U.S. 516, is controlling. This suit was instituted by citizens of another state against the governor and attorney general of the State of Alabama. The relief prayed for was to have certain Alabama statutes declared unconstitutional and to enjoin the collection of certain "toll charges" provided by said statutes. The Supreme Court held that a suit against the attorney general or the governor of a state instituted by the citizens of another state was in violation of the Eleventh Amendment because a suit of this nature was in effect a suit against the State itself. We take the liberty of quoting from the opinion of the Court at length because of the excellent discussion of this opinion contained therein:

"If these principles be applied in the present case there is no escape from the conclusion that, although the state of Alabama was dismissed as a party defendant, this suit against its officers is really one against the state. As a state can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9th, 1895, is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record. If the individual defendants held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession, by simply asserting that they held or were entitled to hold the property in their capacity as officers of the state. In the case supposed they would be compelled to make good the state's claim to the property, and could not shield themselves against suit because of their official character. (Authorities omitted) No such case is before us.

"It is to be observed that neither the attorney general of Alabama nor the solicitor of the eleventh judicial circuit of the state, appears to have been charged by law with any special duty in connection with the act of February 9th, 1895. In support of the contention that the present suit is not one against the state, reference was made by counsel to several cases, among which were Poindexter v. Greenhow, 114 U.S. 270 [29: 185] (Authorities omitted) *Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred,* *they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiffs rights.* There is a wide difference between a suit against individuals holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. *If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former as the executive of the state was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes.* That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong. *Under the view we take of the question, the citizen is not without effective remedy when proceeded against under a legislative enactment*

> *void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void.* And that question can be ultimately brought to this court for final determination.'

It is apparent that the *Fitts* Case is determinative of the fact situation herein alleged by plaintiffs. The Attorney General of Texas is not specifically responsible for the enforcement of Article 7477b. The most that can be said is that he is "in a general sense" charged with the enforcement of all laws and could possibly enforce the terms of this statute.

This power would not be exclusive in that local prosecutors could no doubt seek to enforce it also.

In the case of *Western Union Telegraph Company v. Andrews,* 154 Fed. 95, (U.S.D.C., W.D. Ark. 1907) the Court was presented with a suit to enjoin enforcement of an Arkansas statute which provided for civil penalties because it was unconstitutional. Named as a party defendant was the attorney general of that State and along with him, the prosecutors of the various judicial circuits of the State. In dismissing the case for want of jurisdiction, the Court held as follows:

> "A proceeding against officers of a state merely to test the constitutionality of a state statute in the enforcement of which the officers will act only by formal judicial proceedings in the court of the state, as attorneys for the state is in effect a suit against the state."

See also *Camacho v. Rogers,* 199 F. Supp. 155, (U.S. D.C., S.D. N.Y. 1961); *Union Trust Company v. Stearns,* 119 Fed. 790, (Circuit Court, D. Rhode Island).

In accord with foregoing are the following cases. *Hagood v. Southern,* 117 U.S 52; *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47; *Kennecott Copper Corp. v. State Tax Commission,* 327 U.S. 573; *Mine Safety Appliances Co. v. Forrestal,* 326 U.S. 371; *Ford Motor Co. v. Department of Treasury of State of Indiana,* 323 U.S. 459; *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682; *State Of Minnesota v. Hitchcock,* 185 U.S. 373; *O'Neill v. Early,* 4 Cir., 208 F. 2d 286; and *Fleming v. Upper Dublin Public School District,* D.C., 141 F. Supp. 813.

It is conceded that the courts have long been perplexed by this particular problem. There are many decisions which appear to be in conflict with the aforementioned cases, however, we are of the opinion that all of these cases have two factual variations which distinguish them from the above quoted cases and the case now before the Court. *In each of the cases in which a suit against a state officer was sustained, the state officer was specifically authorized by statute to enforce the particular statute under attack and he was in the process of enforcing it.*

Thus, in *Reagan v. Farmer's Loan and Trust,* 154 U.S. 362, the Supreme Court upheld a suit seeking to enjoin the attorney general of Texas from collecting certain penalties for rate violations. The plaintiffs alleged such penalties were unconstitutional in that they were confiscatory. In holding that the suit could be maintained against such officer, the following quotation from the opinion of the Court illustrates the distinction between this line of cases and the *Fitts* case:

> "The plaintiff in error, Culberson, is the attorney general of the state, who, by section 19 of the

> Act, was charged with the duty of instituting suits in the name of the state for the recovery of all the penalties prescribed by the Act, excepting those recoverable by individuals under the authority of section 17."

This result, under similar facts, was reached in the case by Ex parte Young, 209 U.S. 123.

To maintain a suit against a state officer it must also be alleged that he is taking affirmative action pursuant to the authority expressly granted him in enforcing the statute under attack. It is this affirmative action pursuant to an unconstitutional statute which strips the officer of his official status as an agent of the state, or, as succinctly stated in *Ex parte Young,* Supra:

> "If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected to his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

In the final analysis it is apparent that a suit brought against a State officer is considered to be a suit against the state in violation of the Eleventh Amendment. However, if it is agreed that this suit is brought to declare a state statute unconstitutional, and for such reason it is possible to maintain the suit, we point out that the state officer named as Defendant-Appellant herein was never specifically authorized to enforce the allegedly unconstitutional statute, and he has never actively tried to enforce it against the complainant.

Neither of the conditions necessary to take this case outside of the prohibition of the Eleventh Amendment are present. The plain and obvious intent of this lawsuit is to test the constitutionality of Article 7477b in a manner expressly forbidden by the Supreme Court of the United States in the *Fitts* case. Such a suit should not have been allowed.

III. THE SUIT IS PREMATURELY BROUGHT

The Three-Judge District Court held that "a realistic fear or apprehension that the statute in question will be enforced against them" gave the Oklahoma city and the Oklahoma citizen a right to sue. The District Court cites a contraceptives case where an individual would be subjected to criminal prosecution. The Texas Statute in this cause does not provide a criminal penalty, nor charge the Attorney General with specific enforcement. If this holding is correct, any State Statute can be tested in Federal Courts based on some supposed "apprehension" that enforcement will be sought by the State officers, and a flood of litigation will ensue. The District Court likewise erroneously cites Art. 7477(11), Vernon's Civil Statutes, for the holding that this requires enforcement of Art. 7477b by the Attorney General of Texas. No lawbook codifier can group statutes so as to accomplish a result not in the law. The statute cited relates to Texas water permit "appeals," and does not remotely relate to this suit.

This is a suit for declaratory relief and injunction which is governed by the provisions of Title 28, Sec. 2201, United States Code Annotated.

Section 2201 provides that:

> "In a case of *actual controversy* within its jurisdiction, except with respect to Federal taxes, any

> court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (Emphasis added.)

We submit that this cause of action seeking to declare Art. 7477b unconstitutional and to permanently enjoin the Attorney General of Texas from enforcing same is premature at the present time because the Attorney General of Texas has not enforced Art. 7477b, nor has he in any way manifested an intent to enforce this statute. Plaintiffs-Appellees admit this fact when they state in their complaint that it is the "prospective enforcement of Article 7477b" to which they direct their complaint. They fail to allege any facts which show that the Attorney General of Texas has any intention of enforcing this statute. The Three-Judge District Court gravely erred in holding the statute was a threat in and of itself so as to burden interstate commerce. The mere existence of the statute is certainly no indication of an intent to enforce it. In the absence of any enforcement or intention to enforce Article 7477b, it cannot be said that there is a bona fide "actual controversy" sufficient to give this Court jurisdiction in an action for declaratory relief under the terms of Section 2201.

In the absence of any actual enforcement or intent to enforce the terms of Article 7477b, a suit requesting that this statute be declared unconstitutional is in truth and in fact a suit seeking a prospective advisory opinion concerning the constitutionality of a state statute.

To render an advisory opinion is clearly without the jurisdiction of this Court.

The cases are uniform that the mere passage of a statute is not a sufficient "controversy" to give a federal court jurisdiction in a declaratory action to render a statute unconstitutional in the absence of any enforcement or intent to enforce the particular statute under attack.

Directly in point is *Southern Pacific Company v. Conway,* 115 Fed. 2d 746 (C.C.A. Ariz. 1940). This suit for declaratory relief was brought by the railroad company against the Attorney General of Arizona. The action sought to have the Arizona Train Limit Law declared unconstitutional and to permanently enjoin the attorney general from enforcing such law. Under the terms of the statute the Attorney General of Arizona was specifically vested with the enforcement of the statute. In holding that the cause of action was prematurely brought because there was no "actual controversy" sufficient to give a federal court jurisdiction, the court had the following to say:

> ". . . a sufficient controversy is present when a defendant, *acting* under color of authority, seeks to enforce an act which the plaintiff seeks to prevent on the grounds that the statute is unconstitutional and would, if enforced against the plaintiff, work irrefutable injury. Upon that basis the Supreme Court has sustained injunctions granted by the District Court in numerous cases." (Emphasis added.)

In holding that there was no actual controversy presented, the following quotation is pertinent:

> "As to the contention that it was the duty of the attorney general to endeavor to enforce the law

> of this state, leaving it to the courts to pass upon the question of constitutionality, it is sufficient to observe that the position repeatedly and persistently taken by the Supreme Court is that it cannot be the duty of a public prosecutor to endeavor to enforce a law that violates the Constitution of the United States. It is clear from the decision of the Supreme Court's Ex parte La Prade, 289 U.S. 444, 53 S. Ct. 682, 77 L. Ed. 1311, supra, that the question turns upon the *threats or acts of the officer* rather than from any duty supposed to rest upon him by reason of such unconstitutional act." (Emphasis added.)

Thus, the court recognizes that before a controversy sufficient to give Federal jurisdiction is presented, there must be some overt action, or threat of action, pursuant to the statute under attack. *It is not the unconstitutionality of a statute which is the controlling criteria in cases such as this, but the attempted enforcement of the unconstitutional statute.* The existence of the unconstitutional statute in no way creates a controversy because, as stated in the *Southern Pacific* case, the officer charged with enforcing the statute is under no duty to enforce such statute should it be unconstitutional.

Assuming the Texas Attorney General is charged with the enforcement of Art. 7477b, which fact Defendant-Appellant does not admit, it is not hard to envision the purpose behind a rule such as this which allows such state officer who is charged with the enforcement of a particular statute to determine if such statute is constitutional and should be enforced. The unnecessary adjudication of abstract, hypothetical constitutional questions is thus avoided.

Under Texas law, the action of instituting suit is discretionary in the Attorney General. Before suit is instituted, he is allowed to satisfy himself that the acts constituting a violation, or an offense, have been committed and that there is a reasonable probability that the suit may be prosecuted to a successful conclusion. *Lewright v. Bell,* 94 Tex. 556, 63 S. W. 623 (1901), *Scribner's v. Marrs,* 114 Tex. 11, 262 S.W. 722 (1924). The *Southern Pacific* case is really only additional authority.

Also in point is *Darby v. Daniel,* 168 F. Supp. 170, (U.S.D.C., S.D. Miss. 1958). In this case the Federal district court was presented with an action for declaratory judgment and injunctive relief against the enforcement of the Mississippi champerty and maintenance statutes. The plaintiffs alleged that the Attorney General of Mississippi threatened to enforce these statutes against the plaintiffs and their attorneys and that these statutes were unconstitutional. The Court stated that the evidence showed without dispute that no threats of enforcement had in fact been made or action contemplated at that time. The Court went on to say:

> "The statutes have not been passed upon by the courts of Mississippi.[2] Since the evidence fails to establish that any controversy exists between plaintiffs and either defendant with respect to said statutes, and in view of the long line of Supreme Court decisions committing such matters at least primarily to state court action, plaintiffs cannot maintain this phase of their complaint."

This court likewise recognizes that before a controversy can be said to exist, there must be at least a threatened enforcement of the unconstitutional statute.

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[2] We are in accord with the proposition that the Federal Courts should not exercise jurisdiction until the state courts have had a chance to construe the particular statute under attack. We have more fully developed this point elsewhere in this brief.

The case of *Humble v. State Mineral Board of Louisiana,* 32 F. Supp. 45 (U.S.D.C., W.D. La. 1940), is likewise illuminating. To summarize a lengthy fact situation, the Attorney General of Louisiana rendered an opinion construing certain mineral statutes. Humble then brought suit for declaratory judgment alleging that this Opinion adversely affected certain mineral leases owned by them. In rejecting Humble's contention the Court held that:

> ". . . the facts stated do not show the existence of 'actual controversy.' They merely show that while the view had been generally entertained that 16 sections were not affected by Acts 93 of 1936 and 80 of 1938, defined the power and jurisdiction of the State Mineral Board, recently the Attorney General of the State had rendered opinions, not to the plaintiff or to the State Mineral Board, but to certain District Attorneys of the State, to the effect that leases upon 16 sections can be granted only by said Board. Neither the Board nor anyone else has asserted any rights to or over the properties upon which plaintiff's lease rests, but the petition presents purely the abstract question as to whether, in view of the said statutes and the present opinion of the Attorney General, plaintiff has under the facts alleged, a legal title emanating from the School Board."

The Court continues by holding the following:

> "It is true that plaintiff would like to have the matter cleared up because of the desire to feel safe in its expenditures for other development of the property, but until an actual controversy rises between it and someone else, either by the state demanding surrender or the payment of royalties

> into the general fund, or some other lessee or assignee deriving title through the Mineral Board, I cannot see that the actual controversy intended by the Declaratory Judgment Act, Jud. Code, Section 274d, 28 U.S.C.A. Section 400, exists." (Citations omitted.)

To summarize, it appears to be the rule that before a Federal Court can exercise jurisdiction in a suit brought under the provisions of Section 2201, there must be an actual controversy. Under the holding of the *Southern Pacific* case and the other cases cited, a suit seeking a declaratory judgment rendering a state statute unconstitutional cannot be maintained until there is enforcement or threatened enforcement of the statute which will adversely affect the party seeking relief. It is enforcement, or threat of enforcement, which creates the controversy, not the mere enactment of the statute. By the admission of Plaintiffs-Appellees below, the Attorney General of Texas has not enforced or threatened to enforce Article 7477b. There has been no controversy between the parties and a suit for declaratory judgment is premature at the present time.

IV. THE TEXAS STATUTE IS VALID

Under questions four and five of the questions presented by the appeal in this case, the Defendant-Appellant asserts that Art. 7477b, Vernon's Civil Statutes of Texas, does not violate the Commerce Clause of the United States Constitution and that such statute is a reasonable exercise of the police power of the State.

A. The State in 1917 appropriated uncaptured percolating ground waters, and the landowner has only a right to capture water under statutory rules

Article XVI, Sec. 59 of the Texas Constitution reads in part as follows:

> Sec. 59 (a) The conservation and development of *all* of the *natural resources of this State, including* the control, storing, preservation and distribution of its storm and flood waters, the waters of its river and streams, for irrigation, power *and all other useful purposes,* the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its over-flowed lands, and other lands needing drainage, the conservation and development of its forests, *water* and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." (Emphasis added.)

The Federal District Court in this cause, at page 60 of its opinion erroneously holds that underground water is privately owned "just as any other species of property." The District Court cites Sec. 7 of Art. 7477b (the statute under review here). If such right of "ownership" by the landowner was held to be more than a right to "capture," a right akin to a riparian right, then such a statutory section would not aid Plaintiffs-Appellees, for such a grant of "absolute" title to State of Texas underground water resources would be a private grant of State resources (i.e. ground water) and such cannot be made to an individual. It was for this reason that the Supreme Court of Texas in its latest ground water opinion spoke of "capture" and of "use" rather than ownership—and it was for this reason that the District Court erred in denominating uncaptured percolating ground waters as an article of commerce, when such uncaptured underground percolating waters are res publici and are owned in common by all of the people of the State of Texas both under sound principles of law and under the Texas Constitution. *City of Corpus Christi v. City of Pleasanton,* 154 Tex. 289, 276 S.W. 2d 802 (1955); Art. XVI, Sec. 59, Texas Constitution; *Williams v. City of Wichita,* 190 Kansas 317, 374 P. 2d 578 (1962), Appeal Dismissed in 375 U.S. 7, and Reh. Den. in 375 U.S. 936; *Knight v. Grimes,* 127 N.W. 2d 708 (S. Dakota, 1964).

Reliance by the District Court on Texas statutes "recognizing" the rights of private owners in the ground waters if construed to be a recognition of "absolute ownership" violates the Texas Constitution because the State in 1917 appropriated all natural water resources—among which is uncaptured percolating underground waters. Under this State appropriation of the water then, the Texas Legislature could not give the resource away and Art. 7477b constituted a valid law operating on a thing res publici; the statute was a valid exercise of the State of Texas police power over water which had to be "reduced to possession" before it became subject to the Commerce Clause of the U.S. Constitution. *Geer v. State of Connecticut,* 161 U.S. 519 (1896); *Hudson County Water Company v. McCarter, Atty. Gen. of New Jersey,* 209 U.S. 349 (1908).

The Three-Judge District Court below relied upon two oil and gas cases cited by Plaintiffs-Appellees and said these cases hold that commerce was burdened by the Texas statute (Art. 7477b, V.C.S.). These cases sustain this Defendant-Appellants theory of the case, for in each case the opinion of the court plainly states that the oil or gas was "reduced to possession" and thus became "private property."

The error of the Three Judge District Court in the case at bar is illustrated by *Pennsylvania v. West Virginia,* 272 U.S. 553, at page 586, where Justice Van Devanter, for the Court, writes:

> "Natural gas is found at pronounced depths in porous strata—usually sandrock—constituting a natural reservoir, *and is brought to the surface and reduced to possession through wells drilled in the containing strata. When a surface owner thus reduces it to possession he becomes its owner and it becomes a subject of commerce,* like any product of the forest, field, or mine." (Emphasis added.)

Likewise, on page 593 the Court makes it plain that the statute of the State of West Virginia related to a *"supply of gas produced."* In *West, Atty. Gen. of Oklahoma v. Kansas Natural Gas Co.,* 221 U.S. 229 (1910), the Court is holding as to "produced" gas.

B. Art. 7477b is valid

Succinctly stated, the argument for Defendant-Appellant Waggoner Carr and the State of Texas as to why Art. 7477b, V.C.S. is valid can be stated as follows:

(a) No person owns an absolute title to percolating ground water which flows aimlessly through the ground and must be "captured" and reduced to possession for even a use to be made of such water. *Williams v. City of Wichita, 190 Kan. 317, 374 Pacific 2d 578,* Appeal Dism. 375 U.S. 7, Reh. Den. 375 U.S. 396; *City of Corpus Christi v. Pleasanton,* 154 Tex. 289, 276 S.W. 798, (1955). The laws of most of the Western States are valid only if this principle is true, for many prohibit withdrawal of water without State permission. *Yeo v. Tweedy,* 34 N.M. 611, 286 P. 970 (1930); Laws of New Mexico 1955, Chapter 319, Page 978; *Canada v. City of Shawnee,* 179 Oklahoma 53, 64 P. 2d 694 (1936).

(b) Texas as early as the year 1917, by Article XVI, Sec. 59 of its State of Texas Constitution, took title to all uncaptured percolating waters as a "natural resource," and hence the Supreme Court of Texas wrote its opinion in the *Pleasanton* case, supra, based on use and not on title to the water.

(c) There is no "vested right" to capture and use underground percolating waters in Texas. *City of Corpus Christi v. City of Pleasanton,* supra. *Evans v. Ropte,* 128 Tex. 75, 96 S.W. 2d 973 (Com. App. 1936), was cited by the District Court in this case to support a vested right to capture underground water in Texas. This case related to a surface water spring and concerned a profit a prendre. Besides, the later act of the Texas Legislature could and did change any such claimed common law rule as to the claim of such a vested right. *Baumann v. Smrha,* 145 F.S. 617, (D.C., S.D. New York, 1956), affd. in 77 S. Ct. 96.

(d) Being part of the negative community of things, capture is required before "ownership" of the corpus of underground water can be obtained. *Geer v. Connecticut,* 161 U.S. 519 (1895), and the Texas Legislature by enactment of Art. 7477b (as did the State of Connecticut) could attach "conditions" as to the capture and obtaining of use of the water oozing and filtrating beneath the ground. *City of Corpus Christi v. Pleasanton,* 154 Tex. 289, 276 S.W. 2d 798 (1955).

(e) Common law rules such as the English Rule as to percolating waters, just as riparian rights, can be changed by the Texas Legislature, as it did when it enacted Art. 7477b, V.C.S. since the right to use before capture is not a vested right. *Baumann v. Smrha,* 146 F.S. 617, (D.C.S.D. New York, 1956), affd. in 77 S. Ct. 96.

(f) Enactment of Art. 7477b, V.C.S. of Texas, was an exercise of the police power as authorized by *Geer,* by *Pleasanton,* supra, and by the United States Supreme Court. In *Hudson County Water Company v. McCarter,* 209 U.S. 349 (1908), this Court put its decision not on any attenuated residuum of state ownership of the water, but on the broad exercise of the police power.

(g) The Texas statute (Art. 7477b) operates upon and regulates "withdrawal" from the underground water reservoir and the police power can reasonably operate through this particular type of statute. *Williams v. City of Wichita,* 190 Kan. 317, 374 Pac. 2d 578, Appeal Dism. 375 U.S. 7, Reh. Den. 375 U.S. 936; followed in 391 Pac 2d 93 (192 Kan. 647, 1964); 11 Kan. L. Rev. 558 (May, 1963); 39 N. Dak. L. Rev. 125 (Jan. 1963); 8 S. Dak. L. Rev. 134 (Spring 1963); *Geer v. Connecticut,* 161 U.S. 519 (1895); *Hudson County Water Company v. McCarter, Attorney General of the State of New Jersey,* 209 U.S. 349 (1908).

In the *Geer* case the State of Connecticut enacted a statute which read in part:

> "No person shall at any time kill any woodcock, ruffled grouse, or quail for the purpose of conveying the same beyond the limits of the state; or shall transport or have in possession, with intention to procure the transportation beyond said limits, of any such birds killed within this state."

Edward M. Geer killed a ruffled grouse in "open season"; the bird was confiscated and he was prosecuted. It was held that this statute constituted a reasonable exercise of the police power as he had *unlawfully* gained possession of the birds in violation of certain "conditions" of statutory law placed on his obtaining of possession and that this statute was a reasonable exercise of the police power of the State of Connecticut. His possession of the ruffled grouse with intent to take it out of the State of Connecticut was held to justify the police power in this instance because he could not gain "lawful possession" when he killed the grouse with the intent to take it out of the state. There is no question but what Mock will withdraw the water from the underground source with intent to take it out of the State of Texas in violation of Article 7477b.

Under the circumstances, State of Texas courts, in light of Judge Calvert's opinion in *Pleasanton* should have been allowed to pass upon the Constitutional questions involved in this case; and the Federal Court should refuse to exercise its discretionary equity powers in this particular case.

Whatever the nature of the ownership in ground water may be, the Texas Legislature has constitutional power to regulate through reasonable police powers even property which is held in absolute ownership, should this ultimately be decided as to ground water. Section 7 of Article 7477b, V.C.S., does not define or delineate the nature of the ownership but only recognizes such as may be had. The police power can operate on the "withdrawal" of ground water. *Knight v. Grimes,* 127 N.W. 2d 708 (S. Dak. S. Ct. 1964); *Williams v. Wichita,* supra; *Hudson County Water Company v. McCarter,* supra.

In the *Hudson County* case, a New Jersey Statute prohibited the taking of water into another state. The lower courts sustained the decision on the usufruct or use only which the riparian had in the water. Justice Holmes, speaking for the Court holds that the statute should be sustained on police power grounds:

> *"But we prefer to put the authority which cannot be denied to the state, upon a broader ground* than that which was emphasized below, since, in our opinion, it is independent of the more or less attenuated residuum of the title that the state may be said to possess.
>
> *". . . But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned."* * * * *
>
> "We are of the opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. * * * *
>
> ". . . the state is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.
>
> * * * *
>
> "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter." (Emphasis added.)

Commonwealth of Pennsylvania v. State of West Virginia, 262 U.S. 553 (1923), and *West v. Kansas Natural Gas Co.,* 221 U.S. 229 (1910) were the basis of the District Court holding against this Defendant-

Appellee in this case. By reference to 262 U.S. at page 586 the Court plainly says they are concerned with a case where *"reduction to possession"* had made the captured gas an article of commerce. Justices Oliver Wendell Holmes and Brandeis vigorously dissent even to this concession and their opinions are most enlightening—for Holmes gives examples which show that as a matter of law the statute of Texas (Art. 7477b) is reasonable as a police measure. This reference is made because Justice Holmes wrote the *Hudson County* case, supra, and there is a great similarity in riparian rights and the usufructory correlative right of surface owners to mine for and seek to capture percolating underground waters beneath their lands. *Yeo v. Tweedy,* 34 N.M. 611, 286 P. 970.

(h) Uncaptured ground water, which is what Art. 7477b regulates, is not an article of commerce in interstate commerce. The Supreme Court of the United States has held that mining of coal is not interstate commerce until it is brought to the surface and severed. *Oliver Iron Mining Co. v. Lord,* 262 U.S. 173 (1923); *Kidd v. Pearson,* 128 U.S. 1 (1888), allows regulation of the manufacturer of liquors; *Hammer v. Dagenhart,* 247 U.S. 251 (1918), 3 A.L.R. 649, Ann. Cases 1918E, 724, holds child-made goods are not commerce; *United Mine Workers v. Coronado Coal Co.,* 259 U.S. 345 (1922), 27 A.L.R. 762, holds coal mining is not commerce; *Champlin Refining Co. v. Corporation Commission,* 286 U.S. 210 (1932), holds that oil production is not interstate commerce; and *Utah Power & Light Co. v. Pfost,* 286 U.S. 165 (1932), holds a state may exercise an exclusive control over the manufacture of electricity. Why isn't production of water in this same category?

The drilling of an oil well within a state is not interstate commerce, neither does it affect or burden interstate commerce so as to make it subject to regulation by Congress. *U.S. v. Eason Oil Co.,* 8 Fed. Supp. 365, Appeal Dism. 79 F. 2d 1013. Has not Texas merely regulated the drilling of water wells?

In the field of taxation, the courts have held that the activity of manufacturing or production is not interstate commerce, even though that which is produced is destined for interstate shipment. Why isn't the activity of *drilling* for water a local activity which can be controlled by the state? See *American Manufacturing Company v. City of St. Louis,* 250 U.S. 459, *Utah Power and Light Co. v. Pfost,* 286 U.S. 165; *Hope Natural Gas Co. v. Hill,* 274 U.S. 284 (production of gas). *International Harvester Company v. Department of Treasury,* 322 U.S. 340; *Chassaniol v. City of Greenwood,* 291 U.S. 584.

(i) Even in the absence of "waste" the State of Texas can regulate its underground waters before they are captured and reduced to possession. *Henderson Co. v. Thompson,* 300 U.S. 258 (1937).

CONCLUSION

The questions as to the power of the State of Texas to regulate its underground waters by statutes attaching conditions to the capture and use thereof, and the refusal of the Three-Judge Federal District Court to defer to Texas Courts and abstain, as was done in the Kansas case; to allow the Texas Supreme Court to define the true nature of a landowner's interest in water percolating beneath the surface of his lands; and the jeopardy which the District Court decision in this case places Texas laws as to water, oil and gas; and the jeopardy in which the underground water laws of other Western States are placed by the District Court decision, are of such importance as to require full consideration by the Supreme Court of the United States of America, including the reception of briefs and oral arguments. Defendant-Appellant Waggoner Carr, Attorney General of Texas, urges this Court to accept jurisdiction.

Respectfully submitted,

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PROOF OF SERVICE

I, Roger Tyler, one of the attorneys for Waggoner Carr, Attorney General of the State of Texas, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of August, 1966, I served copies of the foregoing Jurisdictional Statement on the several parties thereto, by mailing a copy in a duly addressed envelope, with first class postage pre-paid, to each of the following Attorneys of Record in this cause:

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APPENDIX

A. Judgment of the District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CITY OF ALTUS, OKLAHOMA, ET AL. v. WAGGONER CARR	CIVIL ACTION NO. 1580

JUDGMENT

The above cause came regularly for hearing before a Three-Judge Court on the 24th day of January, 1966, and was duly submitted for consideration and decision, and the Court, after due deliberation rendered its decision, and on the 6th day of May, 1966, filed its opinion and order for judgment.

Now, therefore, pursuant thereto, IT IS ORDERED, ADJUDGED AND DECREED by the Court that Section 2 of Article 7477b, Vernon's Ann. Tex. Civ. Stats., is, under the facts of this case, void, illegal, unenforceable and repugnant to Article 1, Section 8, Clause 3 of the Constitution of the United States of America, and hereby permanently enjoins the Defendant, Waggoner Carr, and his successors in office, from enforcing Section 2 of Article 7477b, Vernon's Ann. Tex. Civ. Stats., against the Plaintiffs.

Entered this 6th day of May, 1966.

/s/ Homer Thornberry
United States Circuit Judge

/s/ Adrian Spears
Chief Judge, U. S. District Court

/s/ D. W. Suttle
United States District Judge

B. Opinion of the District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CITY OF ALTUS, OKLAHOMA, ET AL. v. WAGGONER CARR	CIVIL ACTION NO. 1580

Before THORNBERRY, Circuit Judge, United States Court of Appeals, SPEARS, Chief Judge, District Court, and SUTTLE, District Judge.

SUTTLE, District Judge.

This is a suit for declaratory judgment decreeing that Section 2 of Article 7477b, Vernon's Ann. Tex. Civ. Stats.[1] is unconstitutional and void as being in violation of the Commerce Clause[2] of the United States Constitution, and for permanent injunction restraining the enforcement or execution thereof against these plaintiffs.

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[1] Sec. 2 of H. B. No. 225, Tex. Acts 1965, 59th Leg., ch. 568 at 1245, effective Aug. 30, 1965.

Section 2 of Article 7477b, Vernon's Ann. Tex. Civ. Stats. (Supp. 1965) reads:

> "No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it."

After a careful consideration of the record, briefs and arguments of counsel, we are of the opinion the plaintiffs are entitled to the relief prayed for.

Summary of Stipulated Facts

The Plaintiffs, City of Altus, Oklahoma, is a municipal corporation and county seat of Jackson County, Oklahoma, and Plaintiffs, C. F. Mock and Pauline Mock, are husband and wife and reside in the City of Altus, Oklahoma. The Defendant Waggoner Carr is the Attorney General of the State of Texas.

The Plaintiff, City of Altus, has an annual water allotment of 4,800 acre feet, set in 1941, from the W. C. Austin Project of the U. S. Bureau of Reclamation. In recent years, due to a rapid growth in population,[3] there has been an increased demand upon the available water supply, which cannot be increased as all available water drawn from the Project over and above the allotment is committed to other users. In 1963, the City of Altus used its entire water allotment, and in 1964 was required to borrow some 700 acre feet of its 1965 allotment.

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[2] Article 1, Section 8, Clause 3, United States Constitution.

[3] The population of the City of Altus has increased from 9,735 in 1959 to an estimated 23,500 at the present Excluding Altus Air Force Base, which from 1960 through 1963 had a

In December, 1963, foreseeing the problem of water shortage, the City of Altus retained an engineering firm to make recommendations as to potential sources of water that might be economically developed so as to meet its future requirements. In its March, 1964, *Report on Water Supply,*[4] the engineering firm recommended that the City of Altus acquire from C. F. Mock and his wife, Pauline, the subsurface water rights in and to land owned by them in northern Wilbarger County, Texas, noting in such report that the Attorney General of the State of Texas in December, 1963, rendered an opinion that it would be legal for a Texas property owner to sell water from his land to an Oklahoma user.[5]

The Mocks' land, approximately 5,663 contiguous acres, lying in northern Wilbarger County, Texas, borders the Red River, the boundary line between Wilbarger County, Texas, and Jackson County, Oklahoma, and is some fourteen miles from the City of Altus, Oklahoma. Approximately six square miles of the Mocks' land is located in the extreme northern portion of an area covering approximately 75 square miles

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constant resident population of 5,598 persons, the City of Altus has had an average annual increase in population of 589 persons from 1950 to 1960. Report on Water Supply, March 1964, pgs. 5-8, Plaintiffs' Exhibit No. 2.

[4] Report on Water Supply, supra note 3.

[5] Attorney General's Opinion C-199, Dec. 20, 1963.

known as the Odell Sand Hills, under which there is a natural subsurface water-bearing formation which contains a high quality percolating ground water suitable for municipal use. The City of Vernon, Texas, some 14 miles south of the Mocks' land, has several wells drawing from this formation, the northern-most well being some four miles south of the southern boundary of the Mock property. With the exception of the Odell Sand Hills, there is no economically available ground water within a 50-mile radius of either the City of Altus or the City of Vernon which is of such quality and quantity.

With the permission of the Mocks, and at the request of the City of Altus, a water-well drilling and engineering firm drilled and logged a series of 26 test holes on the Mock land during the month of July, 1964, for the purpose of testing the quantity and quality of the subsurface water and determining the cost of its production. In its report of September, 1964,[6] the drilling and engineering firm recommended that the City of Altus develop two well fields by drilling 13 wells at suggested sites which would have an estimated yearly yield of approxmiately 2100 acre feet. This combined with the annual allotment from the W. C. Austin Project is estimated to be sufficient to serve the needs of the City of Altus for a period of more than twenty-five years.[7]

In November, 1964, the City of Altus entered into a contract with the Mocks, whereby the City of Altus was granted an option for a period of nine months within which to purchase a lease for producing water from subsurface water-bearing formations underlying the Mocks' land. Then, in December, 1964, the citizens of the City of Altus voted to issue $2,000,000.00 in city bonds to pay for the cost of financing the leasing, drilling and transportation of the water produced from the Mocks' land. The bonds were issued in May, 1965, and in the same month the City of Altus and the Mocks executed a lease whereby the Mocks granted, demised, leased and let unto the City of Altus the Mocks' land for the sole and only purpose of mining and operating for subsurface water and for the transportation of such water to the City of Altus for its use. Pursuant to this lease, the City of Altus has to date incurred expenses totaling approximately $110,720.09 in connection with the investigating and leasing of the subsurface water formation underlying the Mocks' land.

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[6] **Ground Water Survey for City of Altus, Oklahoma, September 1964, Plaintiffs' Exhibit No. 3.**

[7] **Report on Water Supply, supra note 3, at 21-22.**

On January 26, 1965, however, Article 7477b was introduced in the House of Representatives of the State of Texas as House Bill No. 225 by W. S. Heatly. Representative Heatly represents District No. 82, which includes Wilbarger County, Texas. The Texas Legislature passed Article 7477b on May 28, 1965, and adjourned on May 31, 1965. Unless called into special session, the Texas Legislature will not reconvene until 1967.

Jurisdiction

The Defendant, Waggoner Carr, asserts that this Court does not have jurisdiction to consider this case for the reasons that: (1) Section 2 of Article 7477b has never been construed by any Texas Court; (2) the Plaintiffs have made no effort to exhaust the state remedy made available to them by the terms of Section 2 of Article 7477b; (3) the suit is prohibited by the 11th Amendment to the United States Constitution as being one by citizens of one state against another sovereign state, and (4) that since the Attorney General of the State of Texas has in no way manifested an intent to enforce Section 2 of Article 7477b, a suit seeking declaratory relief to have this statute rendered unconstitutional is premature and presents no controversy to give this court jurisdiction.

The Abstention Doctrine

In regard to the first contention, the Defendant submits that it is a well settled principle that federal courts will abstain to exercise jurisdiction in a case where a state statute is under attack as being violative of the United States Constitution until such state statute has first been construed by the courts of that state. This, in general, is true, e.g., Government Employees v. Windsor, 353 U.S. 364, 366 (1957); Shipment v. DuPre, 339 U.S. 321, 322 (1950); American Federation of Labor v. Watson, 327 U.S. 582, 595-599 (1946); Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 171-173 (1942); Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 499-501 (1941). The bases for the doctrine of abstention are "the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions." Martin v. Creasy, 360 U.S. 219, 224 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941). We observe, however, the doctrine of abstention is not an absolute rule to be applied to all cases involving the constitutionality of a state statute. In the recent case of Baggett v. Bullitt, 377 U.S. 360, 375 (1964), the Supreme Court stated:

> "The abstention doctrine is not an automatic rule to be applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the 'special circumstances' prerequisite to its application must be made on a case-by-case basis." (citations omitted)

In this connection, we note that in the case of Harrison v. N.A.A.C.P., 360 U.S. 167, 176 (1959), the Supreme Court, in restating the abstention doctrine, said "that the federal courts should not adjudicate the constitutionality of state enactments *fairly open to interpretation* until the state courts have been afforded a reasonable opportunity to pass upon them" (emphasis supplied), and that the case of the United States v. Livingston, 179 F. Supp. 9, 12-13 (E.D. S.C., 1959) affirmed 364 U.S. 281, 855 (1960), stated:

> "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it."

Accord: Harman v. Forssenius, 380 U.S. 528, 534 (1965); Hosteller v. Idlewild Liquor Corp., 377 U.S. 324, 328 (1964); Chicago v. Atchison T. & S. F. Ry. Co., 357 U.S. 77, 84 (1958); and Toomer v. Witsell, 334 U.S. 385, 392, footnote 15 (1948).

The question here is simply whether Section 2 of Article 7477b is unconstitutional and void as being violative of the Commerce Clause of the United States Constitution. There is no question of state ownership of captured underground water, for the law of Texas is well settled that the landowner has the right to drill wells and appropriate the water beneath his land. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W. 2d 798 (1955);[8] Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904). We are not here concerned with state regulation of a public property, but rather the impediment of an interstate shipment of an article of commerce. Section 2 of Article 7477b is not *"fairly open to interpretation."* We find such Section is clear and unambiguous in meaning, and that under no reasonable construction could the constitutional issue here presented be avoided.

As a basis for the Defendant's second contention asserting the abstention doctrine, the Defendant claims the Plaintiffs are not entitled to an adjudication of the issues in the case at bar until such time as they exhaust the State legislative remedy set forth in Section 2 of Article 7477b. In support thereof, the Defendant cites the case of Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951). In that case the plaintiff, a railroad, after having been denied a permit to discontinue certain intrastate train service by the Alabama Public Service Commission, filed suit in federal court to enjoin enforcement of the

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[8] The case of City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W. 2d 798 (1955), stated that the rule in Texas was that on owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property.

Commission's order. The Supreme Court, noting that under Alabama law the railroad had an appeal as a matter of right from the Commission's order to the state courts of Alabama, held that since an adequate state court review of the administrative order was available to the plaintiff the federal district court should have abstained from exercising its jurisdiction.

The present case, however, differs from Alabama Public Service Commission v. Southern Railway. Here the remedy involved is an application to the Legislature of the State of Texas for them to pass an act authorizing the Plaintiffs to transport the water from the Mock's land to the City of Altus, Oklahoma. This remedy, if it can truly be called such, is in the nature of a political or special legislative remedy, rather than an administrative or judicial remedy as was involved in the Alabama Public Service Commission case. In view of the facts of this case, including the circumstances leading to the enactment of the statute in question, we doubt plaintiffs had any realistic remedy available through the Texas Legislature. We are, consequently, of the opinion that the Plaintiffs should not be required by this court, a court of equity, to exhaust such "remedy." We, therefore, exercise our discretion to assume jurisdiction of the case for adjudication on the merits, rather than abstain. Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 736 (1964).

The 11th Amendment

The Defendant's third plea to the jurisdiction of this court is that this suit is prohibited by the 11th Amendment to the United States Constitution.

The test for determining whether the 11th Amendment applies to a suit is stated in Ex Parte Young, 209 U.S. 123, 155 (1908). It was there stated that:

> "[I]ndividuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

In support of his contention, the Defendant asserts that he, as Attorney General of the State of Texas, is not specifically responsible for the enforcement of Section 2 of Article 7477b, citing the case of Fitts v. McGhee, 172 U.S. 516 (1899) as controlling. The holding of the Fitts case,[9] however, was limited and modified in Ex Parte Young for the reason that it limited the doctrine of Smyth v. Ames,[10] 169 U.S. 466 (1898), the subject of comment by the court in the Fitts case. In this regard Ex Parte Young stated:

> "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making

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[9] The case of Fitts v. McGhee, 172 U.S. 516 (1899), held that a suit against a state officer, who did not have any special relation to the particular statute alleged to be unconstitutional, nor expressly directed to see to its enforcement, was a suit within the contemplation of the 11th Amendment.

[10] The Supreme Court in Smyth v. Ames, 169 U.S. 466, 518 (1898), stated: "It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff is not a suit against the State within the meaning of [the 11th] Amendment."

> him a party as a representative of the State, and thereby attempting to make the State a party.
>
> "It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed, (154 U.S. 362, 366 § 19 of the act), but that may possibly make the duty more clear; if it otherwise exists it is equally efficacious. *The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of general law, or is specially created by the act itself, is not material so long as it exists."* 209 U.S. at 157 (emphasis supplied)

Therefore, we believe the rule set forth in the Young case, rather than the Fitts case, is controlling.

The question here, then, is whether or not the duty of the Defendant toward Section 2 of Article 7477b is sufficient to meet the standards set forth in Ex Parte Young. In this connection, it is noted that the Attorney General is, by virtue of his office, generally charged with the enforcement of the laws of the State of Texas, Agey v. American Liberty Pipe Line Co., 141 Tex. 379, 172 S. W. 2d 972, 974 (1943). Mention is made by us of Article 7477(11) Vernon's Ann. Tex. Civ. Stats., Title 128, Water, Chapter 1, which states in part:

> "Suits to enforce any provisions of this chapter may be prosecuted in the courts of the State by the Attorney General."

The Defendant Waggoner Carr is, by virtue of this statute, specifically granted the authority to prosecute suits to enforce the provisions of Chapter 1, of which

Section 2 of Article 7477b is a part. Therefore, on the basis of the foregoing, this court finds that the Defendant herein meets the test set forth in Ex Parte Young in that he has "some connection with the enforcement" of Section 2 of Article 7477b, thereby taking the case without the contemplation of the 11th Amendment to the United States Constitution. The fact that Article 7477(11) allows the Attorney General discretionary authority as to the institution of suit to enforce the provisions of Article 7477b is not deemed material. See: Ex Parte Young, 209 U.S. 123, 158-9 (1908).

The Defendant further urges, in connection with his assertion that the suit is prohibited by the 11th Amendment, that there must be affirmative action pursuant to the authority to enforce the particular statue before a suit brought against a state officer is considered to be a suit without the contemplation of the 11th Amendment. Since the same assertion as to the necessity of affirmative action is made in reference to the Defendant's plea to the jurisdiction on the ground of prematurity, we reserve discussion and ruling on this contention until after the discussion of the plea to the jurisdiction on the ground of prematurity.

The Prematurity Question

In his final plea to the jurisdiction, the Defendant asserts that since he has in no way manifested an intent to enforce Section 2 of Article 7477b, a suit to declare such a statute unconstitutional is premature and presents no controversy. In support of his plea, the Defendant relies upon Southern Pacific v. Conway, 115 F. 2d 746, 749 (9th Cir. 1940); for the proposition that a threat to enforce, or an expression of intent to enforce, an unconstitutional statute by a state officer is a prerequisite to the maintenance of a suit to declare such statute unconstitutional.

In Southern Pacific v. Conway, a suit to declare the Arizona Train Limit law unconstitutional, the court held that there was no case or controversy because the defendant, the Attorney General of Arizona, had made no threats to enforce the statute in question and had alleged that he had formed no opinion or belief and made no contention as to the constitutionality or unconstitutionality of the statute in question. Ex Parte La Prade, 289 U.S. 444 (1933), cited by the court in the Conway case, was to the same effect. There a petition for mandamus was granted requiring the dismissal for lack of jurisdiction of the principal action as the successor Attorney General, substituted in the suit for his predecessor in office, had done no acts or made no threats to enforce the statute in question; the plaintiff could not rely upon prior threats and acts made by the former Attorney General.

On the other hand, the Plaintiffs rely principally upon the cases of Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 536 (1925), and Brown v. Anderson, 202 F. Supp. 96, 100 (D. Alaska 1962), all of which, in one way or another, indicate a disregard of the requirement of a threat or intent to enforce a statute.

We take notice, also, of the recent case of Poe v. Ullman, 367 U.S. 497 (1961), which concerned an attack on the constitutionality of a Connecticut penal statute prohibiting the use of contraceptives. Therein the Supreme Court, in holding that there was no controversy, stated:

> "It is true that this Court has several times passed upon criminal statutes challenged by persons who claimed that the effects of the statutes were to deter others from maintaining profitable or advantageous relations with the complainants. See e.g., Truax v. Raich, 239 U.S. 33; Pierce v. Society of Sisters, 268 U.S. 510. But in these cases the deterrent effect complained of was one which was *grounded in a realistic fear of prosecution.* We cannot agree that if Dr. Buxton's compliance with these statutes is uncoerced by the risk of their enforcement, his patients are entitled to a declaratory judgment concerning the statutes' validity." 367 U.S. at 508 (emphasis supplied)

An additional approach is presented in Pennsylvania v. West Virginia, which stated:

> "The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in actual practice. But this does not prove that the suits were premature. *Of course they were not so, if it had otherwise appeared that the act would certainly operate as the complainant States apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.* 262 U.S. at 592. (emphasis supplied)

Although there would appear to be a conflict between the holdings of the Supreme Court in Pennsylvania v. West Virginia and Ex Parte La Prade, we believe the correct criterion to be that there must be a realistic fear of prosecution or a realistic fear or apprehension that the statute in question will be enforced against them, and the Court finds that the Plaintiffs herein meet the test of the latter, at least. In this connection, we note that Professor Moore submits that the Court in the case of Southern Pacific v. Conway, which relied upon Ex Parte La Prade in its decision, is in error for the reason that it is not in accordance with the requisite of justiciability set forth in Forthington v. Mellon, 262 U.S. 447, 488 (1923); 6 Moore's Federal Practice § 57.19[2] at 3100 (2d Ed. 1965)."

In relation to the 11th Amendment question previously reserved, we believe that it is not necessary that the state officer, upon whom the duty of enforcing the particular statute lies, take some affirmative action to enforce such statute. If the officer can, by declining to act, enforce the statute, there is "threat" enough to take the suit without the provisions of the 11th Amendment. This is readily seen in the case presently before the Court. True, the Defendant has done no affirmative acts to enforce Section 2 of Article 7477b against the Plaintiffs, but then he did not have to do so. The very presence of the statute itself and the possibility of its enforcement would preclude the Plaintiffs from making the further substantial expenditures of tax monies necessary to obtain and transport the water from the Mock's land to the City of Altus. Already, although no water has yet been transported in interstate commerce in violation of Section 2 of Article 7477b, the Plaintiffs have incurred expenses in the approximate amount of $110,720.09,[11] and would incur further expenses in the approximate amount of $1,311,582.69[12] to effectuate the project.[13] If, however, the statute in question were to be strictly construed so as to require an affirmative "threat," the purpose of Section 2201 of Title 28, United States Code, would be defeated.[14] We are of the opinion that the present case comes well within the purpose of Section 2201, and find that the presence of Section 2 of Article 7477b, in question, and the omission to act on the part of the Defendant constitute sufficient "threat" to take the case without the contemplation of the 11th Amendment.

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[11] Stipulation of Facts, section 6, at 5.

[12] Id. at 5-6.

[13] Report on Water Supply, March 1964, Plaintiffs Exhibit No. 2, Table 7, shows that the total estimated cost, including

Commerce Clause

By virtue of the Commerce Clause, the Congress of these United States was specifically granted the power to regulate commerce among the several states, and the states may not unreasonably burden or interfere with interstate commerce. This is not to say that a state may not, in the absence of conflicting legislation by Congress, make laws governing matters of local concern which may in some measure affect interstate commerce, or even, to some extent, regulate it. Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945). Rather, it means that a state may not enact a law which imposes a direct burden on interstate commerce or discriminates against interstate commerce. Hood & Sons

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interest on the debt, to be $3,524,000 over a twenty-five year amortization period.

[14] The purpose of the Declaratory Judgment Act, Title 28, U.S.C., §2201, was succintly stated in E. Edelmann & Co. v. Triple-A Specialty Co., 88 F. 2d 852, 854 (7th Cir. 1937): "It was the Congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued." Accord: Luckenbach S. S. Co. v. U. S., 312 F. 2d 545 (2d Cir. 1963); Muskegon Piston Ring Co. v. Olson, 307 F. 2d 85 (6th Cir. 1962), cert. denied 371 U.S. 952; Shell Oil Co. v. Frusetta, 290 F. 2d 689 (9th Cir. 1961).

v. DuMond, 336 U.S. 525 (1949); The Minnesota Rate Cases, 230 U.S. 352 (1913). In the recent case of Huron Cement Co. v. Detroit, 362 U.S. 440, 444 (1960), an undue or unreasonable burden was defined as one which materially affects interstate commerce where uniformity of regulation is necessary.

The Plaintiffs contend that Section 2 of Article 7477b constitutes an unreasonable burden upon interstate commerce for the reason that it permits the withdrawal and use of underground water subject to the one and only condition that such water shall not be transported to another state. In support thereof, the Plaintiffs rely upon the cases of Pennsylvania v. West Virginia, 262 U.S. 553 (1923) and West v. Kansas Natural Gas Co., 221 U.S. 229 (1910).

In the case of Pennsylvania v. West Virginia the Supreme Court had before it the question whether a State wherein natural gas is produced and is a recognized subject of commercial dealings may enact a statute which requires that the consumers of such State shall be accorded a preferred right of purchase over consumers in other States. In holding the statute in question an interference with interstate commerce, the Supreme Court stated:

> "The question is an important one; for what one State may do others may, and there are ten States from which natural gas is exported for consumption in other States. Besides, what may be done with one natural product may be done with others, and there are several States in which the earth yields products of great value which are carried into other States and there used. But, notwithstanding the importance of the question, its solution is not difficult. The controlling principles have been settled by many adjudications,—some

so closely in point that the discussion here may be relatively brief.

> "By the Constitution, Art. I, §8, cl. 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the States. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the States have assented to it, all are alike bound by it and all are equally protected by it. Even their power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against such commerce. (citations omitted)
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> "Natural gas is a lawful article of commerce and its transmission from one State to another for sale and consumption in the latter is interstate commerce. A state law, whether of the State where the gas is produced or that where it is sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference." 262 U.S. at 596 (citations omitted)

In West v. Kansas Natural Gas Co., the Supreme Court had before it an Oklahoma statute which denied the right of eminent domain and the right to use the highways of the state for the purpose of transporting natural gas without the state. The effect of the statute was to deny owners of the natural gas the right to transport it out of the state. The Supreme Court, in holding the statute invalid under the Commerce Clause, stated:

> "We place our decision on the character and purpose of the Oklahoma statute. . . . It denies to appellees the lesser right to pass under . . . or over [the highways]. . . . This discrimination is beyond the power of the State to make. As said by the Circuit Court of Appeals in the Eighth Circuit, no State can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends." 221 U.S. at 262.

The Defendant, however, contends that Section 2 of Article 7477b is not a burden on or interference with interstate commerce for two reasons. First, as evidenced by Section 1 of Article 7477b, the purpose and intent of Section 2 is to conserve and protect the water resources of the State by regulating the withdrawal of water from underground sources, and, second, since the statute here in question operates on and regulates underground water, which is not the subject of absolute ownership, it does not affect a substance which is a subject of commerce. In support of his second contention, the Defendant asserts the cases of Pennsylvania v. West Virginia and West v. Kansas Natural Gas Co., relied upon by the Plaintiffs, are distinguishable from this case, and that the cases of Williams v. City of Wichita, 190 Kan. 317, 374 P. 2d 578 (1962) Appeal Dism. 375 U.S. 7, Reh. Den. 375 U.S. 936, and Knight v. Grimes, 127 N.W. 2d 708 (S. Dakota, 1964), are controlling.

In regard to the Defendant's first contention, we observe the assertion therein is not a novel one. This contention was considered in both Pennsylvania v. West Virginia and West v. Kansas Natural Gas Co.

In the West case, the State of Oklahoma asserted that it had the right to conserve, or rather the right to reserve, the resources of the state for the use of its inhabitants. In answer thereto, the Supreme Court stated:

> "The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of these products might be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle?" 221 U.S. at 255.

In Pennsylvania v. West Virginia, the Supreme Court again expressed disapproval of this contention, stating:

> "Another consideration advanced to the same end is that natural gas is a natural product of the State and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation

> in the interest of the people of the State. If the situation be as stated, it affords no ground for the assumption by the State of the power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere." 262 U.S. at 598.

Also, the fact that Section 1 of Article 7477b declares that the purpose and intent of such Article is "to conserve and protect all water resources both public and private" does not bind the Plaintiffs, and they may show that the statute in its practical operation is an unreasonable burden on interstate commerce. Foster Pen Packing Co. v. Haydel, 278 U.S. 1, 10 (1928).

The Defendant seeks to support his position that Section 2 of Article 7477b is a valid and reasonable exercise of the police power on the theory that Section 2 acts only upon uncaptured water, which as no owner, or, if there is an owner, it is the common property of the State of Texas. To support this theory and his general position that under any view the statute is a reasonable exercise of the police power, the Defendant relies primarily upon Greer v. Connecticut, 161 U.S. 519 (1896); Hudson County Water Company v. McCarter, 209 U.S. 349 (1908); Knight v. Grimes, supra, and Williams v. City of Wichita, supra.

In our opinion, none of the above cases presents sufficient authority for this court to disregard the holdings of the cases of Pennsylvania v. West Virginia, and West v. Kansas Natural Gas Co., which are found to be controlling on the issue presented herein. Considering the statute in question only with regard to whether it regulates the transportation and use of water after it has been withdrawn from a well and becomes personal property, such statute constitutes an unreasonable burden upon and interference with interstate commerce. Moreover, on the facts of this case it appears to us that Section 2 of Article 7477b does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister States as in the case of West v. Kansas Natural Gas Co. In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant; for example, from Wilbarger County to El Paso County, Texas. Obviously, the statute had little relation to the cause of conservation.

Under the law of the State of Texas, a landowner has the right to drill wells and appropriate all the underground percolating waters found to his own purposes, and if, in the exercise of such right, he intercepts or drains off water from beneath his neighbor's land, this inconvenience to his neighbor falls within the description of damnum absque injuria, which cannot be the ground of any action. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W. 2d 798 (1955), Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S. W. 279 (1904). This right to enter upon the land and appropriate underground percolating waters is an interest in real estate, and may be exercised by the landowner or made the subject of an independent grant of ownership. Evans v. Ropte, 128 Tex. 75, 96 S.W. 2d 973 (Tex. Comm. of App. 1936). Further, after the water has been appropriated, the landowner, his lessee or assign, has the right to sell the water to others for use off of the land and outside the basin where produced, just as he could sell any other species of property. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W. 2d at 802 (1955); Pecos Co. Water Control & Improvement Dist. v. Williams, 271 S.W. 2d 503, 505 (Tex. Civ. App. 1954, err. ref. n.r.e.); Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273, 278 (1927). These rights, although not codified, have been generally recognized by statute as property rights of sufficient character for ownership. Art. 7880-3c, subsection D, Vernon's Ann. Tex. Civ. Stats. and Art. 7477b, Section 7, Vernon's Ann. Tex. Civ. Stats.[15] Thus, except for Section 2 of Article 7477b, the general law of the State of Texas, which recognizes water that has been withdrawn from underground sources as personal property subject to sale and commerce, would allow the Plaintiff to withdraw water from the Mock's land and transport same to the City of Altus.

This statute, however, seeks to prohibit the production of underground water for the purpose of transporting same in interstate commerce, and has the effect of prohibiting the interstate transportation of such water after it has become personal property. Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone as in the Pennsylvania and West cases, or prohibits the withdrawal of such substance where the intent is to transport such in interstate commerce, the result upon interstate commerce is the same. In both situations, the purpose and intent of the statute and the end result thereof is to prohibit the interstate transportation of an article of commerce. Clearly, then, Section 2 of this statute constitutes an unreasonable burden upon interstate commerce. Plaintiffs should not be denied by the provisions of such statute the right to withdraw and move water in interstate commerce.

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[15] Article 7880-3c, subsection D, provides: "The ownership and rights of the owner of the land, his lessees and assigns, in underground water are hereby recognized, and nothing in the Section 3c shall be construed as depriving or divesting such owner, his assigns or lessees, of such ownership or rights, subject, however, to the rules and regulations promulgated pursuant to this Section 3c." The above is incorporated almost verbatim in Section 7 of Article 7477b.

The relief prayed for by the Plaintiff is in all things granted, and judgment will be entered accordingly.

/s/ HOMER THORNBERRY.
United States Circuit Judge

/s/ ADRIAN SPEARS
Chief Judge, U. S. District Court

/s/ D. W. SUTTLE
United States District Judge

Office-Supreme Court, U.S.
FILED
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No. 481

In the
Supreme Court of the United States
OCTOBER TERM, 1966

WAGGONER CARR,
Defendant-Appellant,
v.
CITY OF ALTUS, OKLAHOMA, et al.,
Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Western District of Texas,
Austin Division.

APPELLEES' MOTION TO AFFIRM

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No. 481

In the

Supreme Court of the United States

OCTOBER TERM, 1966

WAGGONER CARR,
Defendant-Appellant,
v.
CITY OF ALTUS, OKLAHOMA, et al.,
Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Western District of Texas,
Austin Division.

APPELLEES' MOTION TO AFFIRM

To the Supreme Court of the United States:

Appellees move to affirm on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument. The careful and detailed opinion below has correctly resolved each of those questions in accordance with principles that have long since been settled by decisions of this Court.

STATEMENT

The material facts are correctly stated in the opinion below. The "Statement of the Case" presented by Appellant (Jurisdictional Statement 6-8) is substantially accurate, but needs some supplementation and correction.

Appellant says, with respect to Appellee City of Altus's only existing water source, the W. C. Austin Project, that:

> "If the Federal Government would permit it, the Lugert-Altus reservoir water could be used for the higher use without taking water out of the State of Texas." (Jurisdictional Statement 7.)

Such statement is without support in the record. There is no evidence that the Federal Government has the power to permit the City to increase its annual allotment of water from the reservoir (which allotment is set by contract), and no evidence that, even if the Federal Government has such power, it would exercise it in favor of the City of Altus to the detriment of others. It is stipulated that:

> "Attempts by Plaintiff City of Altus to obtain from the Lugert-Altus Irrigation District an increase in its annual water allotment have been unsuccessful since all available water drawn from the Project over and above said allotment is at all times committed to other users." (Stipulation of Facts, para 3.)

Appellant notes that the Odell Sand Hills, about 6 square miles of which are under the ranch of Appellees Mr. and Mrs. C. F. Mock, constitute the only economically available ground water within a 50 mile radius of either Appellee City of Altus, Oklahoma, or the City of Vernon, Wilbarger County, Texas, that is of such quantity and quality as to be adequate and suitable for municipal purposes. (Jurisdictional Statement 6.) We add that the center point of the Mock Ranch, in Wilbarger County, Texas, is midway between the said cities of Vernon and Altus, being about 17 miles from both cities, and that the northern boundary of the Mock Ranch is the southern bank of the Red River, which is the southern boundary of the State of Oklahoma. (Stipulation of Facts, paras. 2, 5.) Appellee City of Altus, in recent years, has enjoyed a rapid growth of population, from 9,735 in 1950 to an estimated 23,500 in 1965. (Stipulation of Facts, para. 2.) It is this growth that has created the critical water shortage now facing the City; the City's annual allotment of water from the W. C. Austin Project, 4800 acre feet, was set by contract in 1941. (Stipulation of Facts, para. 3.) In contrast, the City of Vernon, Wilbarger County, Texas, has decreased in population from 12,651 in 1950 to an estimated 12,500 in 1965. (Stipulation of Facts, para. 3.)

The following chronology will show the considerable amount of work already completed or under way by and on behalf of the City of Altus for the purchase and transport of the ground water from the C. F. Mock Ranch at the time *Article 7477b* was introduced in the Texas Legislature.* It will also be of assistance to the Court in evaluating the purpose of *Article 7477b*.

---

* Up to the time of trial, the City had incurred expenses in the approximate amount of $110,720.09. It has contracted for total expenses of at least $1,311,582.69. (Stipulation of Facts, para. 6.)

1. *Year 1963.* City of Altus for the first time uses its entire annual water allotment of 4800 acre feet.

2. *March 1964.* Holway Engineers, Inc., by its *Report of Water Supply*, makes a study of possible water supply sources for the City of Altus and recommends that water be obtained from the C. F. Mock Ranch.

3. *September 1964.* Layne-Western Company drills water well test holes on the C. F. Mock Ranch and submits the results to the City of Altus in its *Ground Water Survey for City of Altus.*

4. *November 1, 1964.* City of Altus uses all of its 1964 water allotment and is forced to "borrow" 700 acre feet from its 1965 water allotment.

5. *November 4, 1964.* City of Altus and C. F. Mock enter into "Contract and Option" granting the City of Altus an option to purchase ground water from the C. F. Mock Ranch.

6. *December 8, 1964.* Citizens of City of Altus vote to issue $2,000,000.00 in municipal bonds to finance the purchase and transportation of ground water from the C. F. Mock Ranch.

7. *January 26, 1965.* House Bill No. 225 (now *Article 7477b*) is introduced before the Texas Legislature by W. S. Heatly, representative from the Texas legislative district which includes Wilbarger County, location of the C. F. Mock Ranch and the City of Vernon.*

---

* The bill was passed by the Texas Senate on May 26, 1965, and by the Texas House on May 28, 1965. It was signed by the Governor on June 17, 1965.

8. *May 1, 1965.* Bonds of City of Altus for the purchase and transportation of ground water from the C. F. Mock Ranch are issued.

9. *May 29, 1965.* City of Altus and C. F. Mock enter into agreement for the purchase of ground water from the C. F. Mock Ranch.

10. *May 31, 1965.* 59th Legislature of the State of Texas adjourns. (The next regular session of the Legislature will commence on January 10, 1967.)

11. *August 30, 1965. Article 7477b* becomes effective.

ARGUMENT

Appellant's contentions are (1) that the three-judge court should have abstained from exercising jurisdiction, (2) that Appellees' suit violates the Eleventh Amendment, (3) that such suit was premature, and (4) that *Article 7477b, Texas Revised Civil Statutes,* which prohibits the withdrawal of water from any underground source in Texas "for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State," does not constitute an unreasonable burden upon interstate commerce. These same arguments were urged upon the court below. The opinion of that court attests to the thorough consideration that such arguments have received; it shows on its face that logic, justice, and established law required that such arguments be rejected. Such an opinion needs no defense. We only point out that Appellant has shown nothing in his Jurisdictional Statement which casts the slightest doubt upon it.

I. The court below correctly declined to abstain from adjudicating the constitutional question.

Appellant's first contention is that, inasmuch as *Article 7477b, Texas Revised Civil Statutes,* has not been construed by the Texas courts, the court below should have abstained from determining its constitutionality. In overruling Appellant's argument, the court below followed the rule, long since settled by this Court, that deference to state court adjudication need "only be made where the issue of state law is uncertain," *Harman v. Forssenius,* 380 U.S. 528, 534 (1965), that "if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it." *United States v. Livingston,* 179 F. Supp. 9, 13 (E.D.S.C., 1959), affirmed on motion, 364 U.S. 281 (1960).

Section 2, the operative portion of *Article 7477b,* reads as follows:

> "Sec. 2. No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it."

Simply to read this section is to observe that, as in *City of Chicago v. Atchison, T. & S. F. Ry. Co.,* 357 U.S. 77, 84 (1958), there is "no ambiguity in the section which calls for interpretation by the state courts." Indeed, as in *Harman v. Forssenius,* 380 U.S. 528, 536 (1965), Appellant does not designate anything in the statute that leaves "reasonable room" for a state court construction "which might avoid in whole or in part the necessity for federal constitutional adjudication." The statute plainly and simply prohibits interstate commerce in ground water.

Citing *Williams v. City of Wichita, Kansas*, 279 F. 2d 375 (10 Cir., 1960), Appellant insists that the court below should not have determined "rights to underground waters in advance of authoritative action by State courts." (Jurisdictional Statement 9.) In the first place, the *Williams* case is hardly in point: it was a suit to adjudicate the validity of water permits issued under a Kansas statute; the plaintiff did not even contend that such statute was unconstitutional. 279 F. 2d 377. The essential difficulty with Appellant's argument, however, is that, whatever may be the situation in other states, the Texas law of "rights to underground waters" has long since been authoritatively determined. As the court below held, citing two decisions of the Texas Supreme Court, "the law of Texas is well settled that the landowner has the right to drill wells and appropriate the water beneath his land. City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W. 2d 798 (1955); Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904)." (Opinion 6.) See also *Texas Co. v. Burkett*, 117 Tex. 16, 29, 296 S.W. 273, 278 (1927) (Percolating waters "are the exclusive property of the owner of the surface of the soil"); *Pecos County Water Control & Imp. Dist. v. Williams*, 271 S.W. 2d 503, 505 (Tex. Civ. App., 1954), writ refused, n.r.e. ("It seems clear to us that percolating or diffused and percolating waters belong to the landowner, and may be used by him at his will"); *United*

States v. Shurbet, 347 F. 2d 103, 106 (5 Cir. 1965) ("In Texas the common law rule prevails that the owner of the land owns the soil and the percolating water which is part of the soil"). Appellant cites nothing to the contrary, and although he now tells this Court that title to underground water in Texas "is not in the landowners, or, at the very least, such 'ownership' is uncertain" (Jurisdictional Statement 9), he himself recognized, as recently as 1963, that in Texas:

> "It is clear under the authorities that the owner of land is the absolute owner of the soil and of the percolating ground water thereunder * * *." Attorney General's Opinion No. C-199, dated December 20, 1963.

The Texas law is no less "clear" now than it was in 1963. Nor has the Texas Legislature ever undertaken to change it. On the contrary, the express terms of *Article 7477b, Section* 7, confirm the "ownership and rights of the owner of the land * * * in underground water."

There is no ambiguity in *Article 7477b*, and no unsettled question of law, that could justify abstention in this case. No other ground for abstention is now seriously urged.

In the court below, Appellant did contend that, before taking jurisdiction, the court should have required Appellees to exhaust a supposed "remedy" of petitioning the Texas Legislature for a special statute that would exempt them from the provisions of *Article 7477b*.* This point is formally alleged at page 5 of the Jurisdictional Statement, but, since it is not briefed by Appellant, we need not discuss it at length. Suffice it to say that inasmuch as the Texas Legislature does not meet again until 1967, and inasmuch as it is obvious that *Article 7477b* was specifically directed against Appellees, the court below puts it mildly when it expresses "doubt" that Appellees "had any realistic remedy available through the Texas Legislature." (Opinion 7-8.) In any event, the complete answer to this part of Appellant's case is given at pages 7-8 of the opinion below, and such answer is not now challenged by Appellant.

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* It will be recalled that the statute prohibits withdrawal of underground water for use in another state and transporting across state lines "unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it."

It was the clear duty of the court below to proceed, as it did, to adjudicate the constitutional issue.

II. The court below correctedly held that Appellees' suit does not violate the Eleventh Amendment.

At least since *Smyth v. Ames*, 169 U.S. 466, 518-519 (1898), it has been "the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of" the Eleventh Amendment. By *28 U.S.C.A. §2281* the Congress has specifically given three-judge courts the authority to issue an "interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute * * *."

Appellant asked the court below, however, and now he asks this Court, to amend §*2281*, and engraft a limitation on *Smyth v. Ames*, by holding that a suit to restrain a

State officer from enforcing an unconstitutional statute will violate the Eleventh Amendment, unless such officer is "*specifically* authorized by statute to enforce the particular statute under attack." (Jurisdictional Statement 17, emphasis added.) Appellant's contention is without logical substance, and was rejected by this Court in *Ex Parte Young,* 209 U.S. 123 (1908). The *Young* case, which the court below followed and which Appellant does not attempt to overcome, holds:

> "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.
>
> "It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (154 U.S. 362, 366, § 19 of the act), but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." (209 U.S. 157.)

Ex Parte Young was re-affirmed in *Georgia Railroad & Banking Co. v. Redwine,* 342 U.S. 299 (1952). See also *Louisiana State Board of Education v. Baker,* 339 F. 2d 911 (5 Cir., 1964).

Appellant relies heavily upon *Fitts v. McGhee*, 172 U.S. 516 (1899). In *Ex Parte Young*, however, the *McGhee* case was limited to its facts—i.e., to situations in which the state officials being sued "occupied the position of having no duty at all with regard to the act." *209 U.S. 158*. Appellant, Attorney General of the State of Texas, could not and does not occupy that position with regard to a Texas statute which undertakes to prohibit the removal of water from the state. The Texas Supreme Court has held, in a case cited by the court below and in no way challenged by Appellant, that the Attorney General "is the chief law officer of the State, and it is incumbent upon him to institute in the proper courts proceedings to enforce or protect any right of the public that is violated." *Agey v. American Liberty Pipeline Co.*, 141 Tex. 379, 382, 172 S.W. 2d 972, 974 (1943). Moreover, as pointed out by the court below, the Texas Legislature, in *Article 7477(11), Texas Revised Civil Statutes*, has specifically given the Attorney General the right "to enforce any provisions of" that chapter of the Texas statutes which deals with the use of state water.* And, if is interesting to note, Appellant certainly does not disclaim the power to enforce *Article 7477b;* on the contrary, he agrees that "he is 'in a general sense' charged with the enforcement of all laws and could possibly enforce the terms of this statute." (Jurisdictional Statement 16.)[*] It is abundantly clear that Appellant has at least "some connection with the enforcement of" *Article 7477b,* and that, therefore, Appellees' suit to restrain such enforcement is not in violation of the Eleventh Amendment. *Ex Parte Young,* 209 U.S. 123 (1908), *supra.*

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* At page 19 of the Jurisdictional Statement, Appellant contends that *Article 7477(11), Texas Revised Civil Statutes* (which authorizes the Attorney General to enforce the provisions of "this Chapter"), only "relates to Texas water permit 'appeals,' and does not remotely relate to this suit," and further contends that, in suggesting that *Article 7477(11)* would give the Attorney General the right to enforce *Article 7477b*, the court below has relied solely upon the whim of a "law book codifier." A glance at the Texas statutes will show, however, that the court below was right and Appellant is wrong. In 1925, the Texas Legislature (not a law book company) codified all statutes relating to the use of state water into *Chapter 1, Title 128, Texas Revised Civil Statutes*, and gave such chapter the title of "Use of State Water." In 1953, the Texas Legislature passed a statute which declared that "Article 7477 of Chapter 1 of Title 128 of the Revised Civil Statutes of Texas, 1925, be and the same is hereby amended so as to hereafter (footnote continued)

Appellant also insists that Appellees' suit is barred by the Eleventh Amendment because, he says, the procedure afforded by *28 U.S.C.A. §2281* must be restricted to cases in which the state official being sued has "actively tried to enforce" the statute "against the complainant." (Jurisdictional Statement 18.) This is simply a claim that Appellees' suit is premature; and, therefore, following the order of both

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(footnote continued from page 11)

read as follows: * * *." *Acts 53rd Texas Legislature, Regular Session, p. 874.* The provision which is now *Article 7477(11)* was part of this 1953 amendment to such Chapter 1. Thus, the authority to enforce the provisions of "this Chapter," given the Attorney General by *Article 7477(11),* is the authority to enforce the provisions of *Chapter 1, Title 128, Texas Revised Civil Statutes,* dealing with the use of state water. *Article 7477b* deals with the use of water located within the state. It thus follows that, under the authority vested in him by *Article 7477(11),* Appellant would have the power to enforce *Article 7477b.*

[*] Appellant says that his power to enforce *Article 7477b* "would not be exclusive in that local prosecutors could no doubt seek to enforce it also." (Jurisdictional Statement 16.) While we are uncertain as to what this has to do with the Eleventh Amendment, we point out that, at least in federal court, Appellant's power to enforce *Article 7477b* would indeed be exclusive. Local prosecutors can represent the State of Texas only in the district and inferior courts of such prosecutors' respective counties. *Texas Constitution, Article V, §21.*

the court below and the Jurisdictional Statement, we will discuss such claim in the section which immediately follows.

III. The court below correctly held that Appellees' suit is not premature.

Appellant's contention that this suit presents no "bona fide 'actual controversy' sufficient to give this Court jurisdiction" (Jurisdictional Statement 20), is answered by the stipulated facts of this case. Appellee City of Altus is in obvious need of water. (Stipulation of Facts, para. 3.) As early as March 1964, an engineering firm recommended that the City acquire from Appellees the Mocks the subsurface water rights in and to land owned by the Mocks in Wilbarger County, Texas. (Stipulation of Facts, para. 4.) On December 8, 1964, the City voted a $2,000,000.00 bond issue to pay for the cost of financing the leasing, drilling, and transportation of water from the Mock land, and the bonds were issued on May 1, 1965. (Stipulation of Facts, para. 5.) On May 29, 1965, by written agreement, Appellees the Mocks leased their land to the City for the sole and only purpose of mining and operating for subsurface water and for the transportation of such water to the City of Altus for its use. By the time of trial, Appellee City had incurred expenses totalling approximately $110,720.09 in connection with its project. All of this will be in vain, however, if the City cannot transport water produced from the Mock lands into Oklahoma. *Article 7477b*, introduced in the Texas Legislature by the representative from the district which includes the Mock land, and enacted in 1965, specifically forbids the transportation of such water across state lines. Appellees cannot go forward with the performance of their lease until they can establish the invalidity of *Article 7477b*. The statute is self-executing.

It was observed by the court below, and not denied by Appellant, that the intent of the Declaratory Judgment Act, *28 U.S.C.A. §2201,* was "to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued." *Edelmann & Co. v. Triple-A Specialty Co.,* 88 F. 2d 852 (7 Cir. 1937), cert. den., 300 U.S. 680 (1937), quoted below at opinion footnote 14. The jurisdictional requirement is only that there "be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Inc. Co. v. Hayworth,* 300 U.S. 227, 241 (1937). "Thus the fundamental test is whether the plaintiff seeks merely advice or whether a real question of conflicting legal interests is presented for judicial determination." *Simmonds Aerocessories v. Elastic Stop Nut Corp.,* 257 F. 2d 485, 489 (3 Cir., 1958). Accord: *Application of President & Directors of Georgetown College,* 331 F. 2d 1000 (D.C. Cir., 1964), cert. den., 377 U.S. 978 (1965). Certainly, this test has been met here. Appellees' suit was not brought to try out some abstract, hypothetical question. It was brought to preserve and protect existing rights from loss or destruction, and to insure that the City may legally acquire the water it so badly needs. This is precisely the kind of suit for which the Declaratory Judgment Act was designed.

Appellant says, however, that the suit "is premature at the present time because the Attorney General of Texas has not enforced Art. 7477b, nor has he in any way manifested an intent to enforce this statute." (Jurisdictional Statement 20.) The court below has properly rejected this argument as both legally unsound and factually unrealistic.

Appellant relies heavily upon *Southern Pacific v. Conway*, 115 F. 2d 746 (9 Cir., 1940). In that case, however, the defendant-Attorney General expressly declared "that he had formed no opinion or belief and makes no contention either as to the validity, constitutionality or unconstitutionality" of the challenged statute, *115 F. 2d 748*, and that he "would not attempt to enforce the law until he formed an opinion that it was constitutional." *115 F. 2d 749*. Here, in contrast, Appellant has specifically pleaded that *Article 7477b* "is a valid exercise of the residual power vested in the various United States under the 10th Amendment of the United States Constitution, in that it seeks to insure and provide an adequate water supply for the citizens of Texas," and he has prayed "that Plaintiffs be denied all relief sought because Art. 7477b is a valid and constitutional statute, duly enacted by the Legislature of the State of Texas, for the protection and welfare of its citizens." (Defendant's Original Answer.)* Moreover, the *Southern Pacific* case has never been approved by this Court, and Professor Moore, in *6 Moore's Federal Practice §57.18 (1965)*, has criticised it as follows:

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* Contrary to page 25 of the Jurisdictional Statement, there has never been, in our case, any "admission of Plaintiffs-Appellees below" that "the Attorney, General of Texas has not enforced or threatened to enforce Article 7477b."

> "The very presence of the statute was a direct and immediate threat to [the plaintiff-railroad's] interests. The fact that the Attorney General refused to commit himself on the issue of validity was of no comfort to the railroad. If it violated the terms of the statute, it subjected itself to a suit for the recovery of the harsh statutory penalties. If it obeyed the statute, it suffered an economic loss. Such a choice should not have been forced upon it. Even had the Attorney General publicly declared that in his opinion the statute was unconstitutional, this would afford scant protection for he would not be bound to follow such a determination, and certainly his successor could disregard it." (6 Moore, p. 3101.)

The only other decisions relied upon by Appellant are two district court cases, neither of them even arguably in point. In *Darby v. Daniel*, 168 F. Supp. 170 (D.C. Miss., 1958), the plaintiffs claimed that they were being harassed by the Attorney General's threats to enforce the Mississippi champerty and maintenance statutes against them. The district court held that there was no evidence of any such threats. In *Humble Oil & Refining Co. v. State Mineral Board*, 32 F. Supp. 45 (D.C. La., 1940), after the Louisiana Attorney General had rendered a legal opinion which, if correct, might have adversely affected the plaintiff's mineral leases, the plaintiff sought an advisory opinion from the federal district court as to whether the Attorney General was correct. The district court refused to give it. In neither of these cases did the court require litigants, as Appellant would have this Court require Appellees, either to abandon a large investment and deprive a growing city of adequate water or to violate a statute which had been expressly directed against them. Neither of these cases could or did say or suggest that the declaratory judgment procedure is unavailable to a litigant who has been placed in such a dilemma.

No other cases are cited by Appellant. It is accurate to say, therefore, that, in an effort to support a position that is technical in the extreme, he relies exclusively upon decisions which have never been approved by this Court. In contrast, the court below has precisely followed the decisions of this Court and has thereby reached the only result that can be justified on the basis of fairness and realism.

In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), followed by the court below and never mentioned in the Jurisdictional Statement, suits were brought to restrain the Governor and other Oregon officials from threatening to enforce a compulsory education statute adopted in 1922 but not effective until 1926. The injunctions were granted, and this Court affirmed in 1925, even before the statute had become effective. The Court said:

> "The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity." (268 U.S. 536.)

In *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923), also cited by the court below and left unchallenged by Appellant, this Court was concerned with the constitutionality of a West Virginia statute which placed restrictions upon the sale of natural gas outside of the state's borders. The case was filed only a few days after the statute had become effective, and no effort had been made by West Virginia to enforce it. Nevertheless, the Court found that the suits were not premature. It said:

> "The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant States apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." (262 U.S. 592-593.)

See also *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Sunshine Mining Co. v. Carver*, 41 F. Supp. 60 (D.C. Idaho, 1941); *Brown v. Anderson*, 202 F. Supp. 96 (D.C. Alaska, 1962).

In *6 Moore's Federal Practice §57.18 (1965)*, the author urges that the following is the correct rule of law:

> "Accordingly it is believed that the declaratory action does not rest upon the vicissitudes of the prosecuting officer's personal opinion as to the validity of the public act. Where the enforcement of a regulatory statute would cause plaintiff to sustain a direct injury, the action may properly be maintained, whether or not the public officer has 'threatened' suit: the presence of the statute is threat enough." (*6 Moore, p. 3101.*)

It can hardly be questioned, we submit, that the court was correct in applying that principle to this case. No reasonable person or city is going to spend more than $1,000,000.00 to consummate a transaction which is in express violation of a statute that has never been determined to be invalid. Yet, if the City of Altus cannot make such an expenditure in this case, a large investment already made, and needed water rights duly contracted for, will be lost. Surely Appellees do not "have to await the consummation of threatened injury to obtain preventive relief" against a statute so harmful to them. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

IV. The court below correctly held that Article 7477b is an unconstitutional burden on interstate commerce.

Article 7477b, Texas Revised Civil Statutes, provides that no one may "withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State * * *." It is difficult to imagine a more direct burden upon interstate commerce. *U.S. Constiution*, Article I, §8, cl. 3. The statute does not merely regulate interstate commerce in ground water, it prohibits it. It is in direct contravention of the policy so carefully described by this Court in *Hood & Sons v. Du Mond*, 336 U.S. 525 (1949):

> "The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions.

> We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun! Or suppose that the field of discrimination and retaliation be industry. May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met? Would she not have every argument in the favor of such a statute that can be offered in support of New York's limiting sales of milk for out-of-state shipment to protect the economic interests of her competing dealers and local consumers? Could Ohio then pounce upon the rubber-tire industry, on which she has a substantial grip, to retaliate for Michigan's auto monopoly?
>
> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." (336 U.S. 538-539.)

In *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), this Court had before it a West Virginia statute which attempted to regulate the interstate transportation of natural gas, produced within West Virginia's borders, by requiring that local demands first be satisfied before any of such gas could be transported outside of the state. This Court held the statute unconstitutional. It said:

> "Of course, in the last analysis, the question is whether the enforced withdrawal for the benefit of local consum-

ers is such an interference with interstate commerce as is forbidden to a State by the Constitution. The question is an important one; for what one State may do others may, and there are ten States from which natural gas is exported for consumption in other States. Besides, what may be done with one natural product may be done with others, and there are several States in which the earth yields products of great value which are carried into other States and there used. But, notwithstanding the importance of the question, its solution is not difficult. The controlling principles have been settled by many adjudications,—some so closely in point that the discussion here may be relatively brief.

"By the Constitution, Art. I, §8, cl. 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the States. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. * * *

"Natural gas is a lawful article of commerce and its transmission from one State to another for sale and consumption in the latter is interstate commerce. A state law, whether of the State where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference. [Citations.] The West Virginia act is such a law. Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant States, and therefore will work a serious interference with that commerce." *262 U.S. 595-597.*

The *West Virginia* decision followed an earlier case, *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), which held unconstitutional an Oklahoma statute that prohibited the construction of pipelines over or under state highways for the purpose of transporting natural gas beyond the state. The effect of the statute, of course, was greatly to restrict the owners of such natural gas from transporting it out of the state. This Court held:

> "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce * * *." 221 U.S. 255.
>
> "We place our decision on the character and purpose of the Oklahoma statute. The State, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the State to make. As said by the Circuit Court of Appeals in the Eighth Circuit, no State can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends." 221 U.S. 262.

There is no reasonable distinction between natural gas and ground water, and Appellant suggests none. And *Article*

7477b is a far more substantial interference with interstate commerce than the statutes struck down in *West Virginia* and in *Kansas Natural Gas*. The West Virginia statute did not prohibit the export of natural gas not needed by West Virginia citizens. The Oklahoma statute did not prohibit interstate pipelines which could be constructed somewhere other than beneath state highways. But *Section 2, Article 7477b*, is an unequivocal, direct, and unlimited prohibition against *any* interstate transportation of Texas ground water. The court below had no choice but to declare *Article 7477b* unconstitutional.

In his effort to uphold the statute, Appellant advances the very same arguments that he urged upon the lower court. He contends (1) that, under Texas law, the water to be withdrawn from the wells on the Mocks' land is public property, and, hence, not an article of commerce, and, (2) that even if he is wrong, and the water is "commerce," the State of Texas may nevertheless prohibit the transportation of such commerce beyond its borders.

In this Court, Appellant's greater emphasis is on his first argument—that the Texas law is that water captured by wells on the Mocks' land belongs, not to the Mocks, but to the State. (Jurisdictional Statement 26-29.) The issue raised thereby is, however, purely a question of state law. The court below, composed of three Texas judges, has decided that the Texas law is against Appellant. The Supreme Court will not overrule them unless Appellant can show that their conclusion "is clearly erroneous or unreasonable." *United States v. Durham Lumber Company*, 363 U.S. 522, 527 (1960).

See also *Propper v. Clark*, 337 U.S. 472 (1949); *Spiegel v. Commissioner*, 335 U.S. 701 (1949).

Appellant's attempt to sustain this burden is based primarily upon an argument that *Article XVI*, §59, *Texas Constitution*, which declares that the "conservation and development of all of the natural resources of this State * * * are each and all hereby declared public rights and duties," vests absolute title to underground water resources in the State of Texas. (See Jurisdictional Statement 26-27.) That contention has been foreclosed against Appellant at least since *Texas Co. v. Burkett*, 117 Tex. 16, 296 S.W. 273 (1927). Of that case, the Supreme Court of Texas said, in 1955:

> "[B]y its holding in Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273, 278, 54 A.L.R. 1397, decided some ten years after the adoption of the Conservation Amendment to the Constitution, Article XVI, § 59, Vernon's Ann. St., and the enactment of Articles 7602, V.A.C.S. and 846, Penal Code, this Court established that under the common-law rule there was no restriction against the sale of percolating waters for industrial uses off of the land. The Court said the waters 'were the exclusive property of Burkett [the owner of the land on which the water was captured], who had all the rights incident to them that one might have as to any other species of property." *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 294, 276 S.W. 2d 801-802 (1955).

Moreover, as we have seen, later Texas decisions have reaffirmed this principle, *Pecos County Water Control & Imp. Dist. v. Williams*, 271 S.W. 2d 503 (Tex. Civ. App., 1954), writ refused, n.r.e.; *United States v. Shurbet*, 347 F. 2d 103 (5 Cir., 1965); and, in 1963, some forty-six years after the adoption of the Conservation Amendment, Appellant himself recognized that it "is clear under the authorities that the owner of land is the absolute owner of the soil and of the percolating ground water thereunder." *Attorney General's Opinion No. C-199 (1963).*

The consequence of this "clear" and settled rule of law is that, whatever may be the law in some western states (a point not even remotely at issue here), it is simply not true in Texas that, as alleged by Appellant, there "is no 'vested right' to capture and use underground percolating waters." (Jurisdictional Statement 29.) In *City of Corpus Christi v. City of Pleasanton,* 154 Tex. 289, 276 S.W. 2d 798 (1955), the common law of Texas was summarized as follows:

> "It thus appears that under the common-law rule adopted in this state an owner of land could use all of the percolating water he could capture from wells on his land for whatever beneficial purposes he needed it, on or off of the land, and could likewise sell it to others for use off of the land and outside of the basin where produced, just as he could sell any other species of property." (154 Tex. 295, 276 S.W. 2d 802.)

This same common law is the Texas rule today. There is not the slightest basis for Appellant's assertion that the legislature "did change" it. (Jurisdictional Statement 29.) In fact, *Article 7477b, Section 7,* specifically recognizes and confirms the "ownership and rights of the owner of the land * * * in underground water."

As an incident of the ownership of such water as their wells can capture, the Mocks may "sell it to others for use off of the land and outside of the basin where produced, just as [they] could sell any other species of property." *City of*

Corpus Christi v. City of Pleasanton, 154 Tex. 289, 295, 276 S.W. 2d 798, 802 (1955). *Article 7477b* so recognizes: it does not attempt to forbid the Mocks to sell their water intrastate. Clearly, then, the Mocks' water is, under Texas law, an article of commerce, just as the court below held it was. Far from being "clearly erroneous or unreasonable," such holding is in precise accord with unanimous Texas authority.*

There remains Appellant's final argument—that *Article 7477b* does not violate the Commerce Clause, that despite the clear holding of this Court in *West v. Kansas Natural Gas Co.*, 221 U.S., 229, 255 (1911), quoted above at page 22, the State of Texas may recognize ground water to be the subject of intrastate commerce but prohibit it from being the subject of interstate commerce.

The sole basis of Appellant's argument is that *Article 7477b*, he says, "is reasonable as a police measure." (Jurisdictional Statement 33.)

Exactly what facet of the police power Appellant has in mind is by no means clear. In the district court, Appellant urged that the statute was valid as a conservation measure, but the three-judge court rejected that contention, and Appellant does not pursue it here** and could not reasonably have done so. So far as *Article 7477b* is concerned, the Mocks can sell their water for transportation intrastate to Brownsville, Texas (a distance of more than 600 miles), by as wasteful a method as possible; what the statute provides is that, even if the water will be transported without any waste at all, the Mocks cannot sell it for transport to Oklahoma, which is at the northern boundary of their ranch. Quite obviously, *Article 7477b* bears no relationship to conservation of natural resources.

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* We need only briefly notice Appellant's contention that, by *Article 7477b*, Texas has "merely regulated the drilling of water wells." (Jurisdictional Statement 33-34.) The statute does no such thing. It permits the landowner to drill wells wastefully or carefully, safely or dangerously. It regulates, not the drilling of the wells, but the interstate transportation of the water captured by such drilling. As observed by the court below, it is apparent, despite the phraseology of the statute, that its purpose, intent, and end result is to prohibit the interstate transportation of an article of com-

** Appellant seems to concede that there is no issue of conservation or waste involved. See Paragraph (i), Jurisdictional Statement 34.

The cases so heavily relied upon by Appellant, *Geer v. Connecticut*, 161 U.S. 519 (1896), and *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), are not in point. Neither of them involved a privately owned natural resource. Both dealt with statutes that applied to property in which the state had a proprietary interest.

In *Geer*, this Court was concerned with a Connecticut statute which prohibited the killing or transportation of woodcock, ruffled grouse, or quail for the purpose of conveying the same beyond the limits of the state. The Court upheld the statute upon the premise that "wild game within a State belongs to the people in their collective sovereign capacity. It is not the subject of private ownership * * *." 161 U.S. 529. In contrast, the water that Texas landowners may withdraw from wells on their land is not the subject of collective ownership but, as held by the three Texas judges below, is the private property of the landowner.

The *McCarter* case is of similar import. Under a New Jersey statute which prohibited the transportation of water from "any fresh lake, pond, brook, creek, river or stream of this State into any other state," the defendant was enjoined from carrying water from the Passaic River into New York. The defendant contended the statute was unconstitutional, but this Court affirmed. Justice Holmes, speaking for the Court, said:

> "[I]t appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." 209 U.S. 356.

The Court further observed, citing *Greer v. Connecticut*, 161 U.S. 519 (1896), supra, that one "cannot acquire a right to property by his desire to use it in commerce among the States," 209 U.S. 357.

Thus, it is clear that the New Jersey statute did not affect, and this Court did not hold that it did affect, the transportation of private property in interstate commerce. And, therefore, it is equally clear that the remarks of Justice Holmes, quoted at page 32 of the Jurisdictional Statement, are taken out of context and do not provide any support for *Article 7477b*. The *McCarter* case was concerned with the power of a state to prohibit a riparian appropriator from transporting, outside of the state, water taken from a river wholly within the state. The usufructary rights of a riparian appropriator in and to a public body of water and the absolute right of a land owner in and to his ground water are clearly distinguishable.

In any event, if any of the dictum in *McCarter* is susceptible to the interpretation that a state can prevent the export of privately owned natural resources, such interpretation has been expressly repudiated by this Court.

In *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), the case which struck down the Oklahoma statute, the *McCarter* opinion was urged upon the Court, but the Court noted that the *McCarter* decision was founded upon two propositions: (1) that fresh water lakes, ponds, brooks, and rivers, and the waters flowing therein, constitute an important part of the natural advantages of the state, and (2) that the common law recognized in the riparian owner no right to divert water from the stream in order to make merchandise out of it. The Court then held, Mr. Justice Holmes dissenting, that neither of those propositions would support a statute which, like *Article 7477b*, involved individual property subject to sale by its owner.

At the same time, a lower federal court was concerned with the same Oklahoma statute that was before the Supreme Court in *West v. Kansas Natural Gas Co., supra.* The state there relied upon the *McCarter* opinion, but the circuit court, like the Supreme Court, held it to be inapplicable. It said, in *Haskell v. Cowham*, 187 F. 403 (8 Cir., 1911):

> "Hudson Water Co. v. McCarter, 209 U.S. 349, 356, 28 Sup. Ct. 529, 52 L. Ed. 828, wherein the Supreme Court held that a state might lawfully prohibit the transportation of the waters of its rivers, lakes, and ponds out of the state by means of canals or conduits because the interest of a state to maintain the rivers within it undiminished by diversions of their waters from their natural channels to other jurisdictions is fundamental, omnipresent, more pressing as population increases and superior to the right of the riparian proprietors which is subject 'to the initial limitation that it may not substantially diminish one of the great founda-

> tions of public welfare and health.' But the right of the owner of grain, iron, coal, oil, and natural gas in a state is subject to no such initial limitation. The reason for the rule which dominates this decision does not exist in the case of the prohibition of the transportation out of a state of such articles owned by private parties and cessante ratione, cessat et ipsa lex." 187 F. 411.

If there remained any lingering doubt but that the dictum in *McCarter*, relied upon here by Appellant, is inapplicable to a commodity which "belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him," *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911), it was dispelled by this Court in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). In that case, with Mr. Justice Holmes dissenting and urging the *McCarter* opinion, this Court followed *West v. Kansas Natural Gas Co.* and held unconstitutional a West Virginia statute that interfered with interstate commerce in natural gas.

For the foregoing reasons, it is clear that the court below was correct when it described Appellant's police power argument as "not a novel one" (Opinion 18) and rejected it upon the basis of the law as set out in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), and *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Such argument was expressly rejected by those cases, more than forty years ago, and has not since been successfully urged. "[I]n the matter of interstate commerce, we are a single nation—one and the same people." *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923). See also *Hood & Sons v. Du Mond*, 336 U.S. 525, 538-539 (1949).

Three Texas judges have carefully examined *Article 7477b, Texas Revised Civil Statutes*, and, after considering every contention which Appellant now makes in this Court, have determined that the statute cannot be upheld. Their decision and opinion are so clearly correct that there is no necessity or justification for further review by this Court.

CONCLUSION

The Jurisdictional Statement does not and cannot show any error on the part of the court below. It is clear that the judgment of that court was right, for each and all of the reasons assigned in its opinion. There is nothing that could even begin to justify plenary consideration of this case by the Supreme Court of the United States. Accordingly, Appellees pray that this Motion to Affirm be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, A. W. Walker, Jr., Attorney for Appellees, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of September, 1966, I served copies of the foregoing Appellees' Motion to Affirm on the Appellant, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to each of the following Attorneys of Record in this cause:

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NO. 481

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

WAGGONER CARR,
Defendant-Appellant,
vs.
CITY OF ALTUS, OKLAHOMA, ET AL.,
Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

APPELLANT'S BRIEF OPPOSING MOTION TO AFFIRM

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NO. 481

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

WAGGONER CARR,
Defendant-Appellant,
vs.
CITY OF ALTUS, OKLAHOMA, ET AL.,
Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

APPELLANT'S BRIEF OPPOSING MOTION TO AFFIRM

To The Supreme Court of the United States:

STATEMENT

Comes now Waggoner Carr, Attorney General of the State of Texas, Appellant herein, and files this Brief Opposing the Motion to Affirm under Rule 16 of the Rules of the Supreme Court of the United States. There are grave and substantial questions of law which require oral argument and full consideration by the Supreme Court of the United States in the case at bar because the opinion of the Three Judge District Court departs from logic, justice and established law to enter the forbidden field which Federal Courts have consistently refrained from entering; and has passed upon the unsettled nature of the title to percolating underground waters under lands in the State of Texas. There is still a substantial question of law as to the nature of this title in underground water to be considered and decided in this direct appeal, for there can be no vested rights to capture in Appellees which would defeat the new Texas statute.

Appellees' Motion to Affirm in this case, really consists of a tacit recognition of the weakness of the opinion rendered below, for Appellees laboriously seek to justify a departure from established rules of law and attempt to justify shocking new principles of law which could destroy the underground water laws of the other sixteen western states, and perhaps destroy conservation and regulation of the oil and gas industry within this State of Texas, and all of this on the theory that actions of the State of Texas controlling withdrawal of ground water in any respect would burden, threaten and interfere with interstate commerce. Appellant in this case is in good company in urging validity of the Texas statute (Art. 7477b) because he stands with Mr. Justice Oliver Wendell Holmes and Mr. Justice Brandeis, and with the powerful dissent of Mr. Justice Black in *Hood vs. Dumond,* 336 U.S. 525 (1948).

ARGUMENT AND AUTHORITIES

Appellant advanced arguments and authorities to show that the Three-Judge Court should have abstained from exercising jurisdiction, that this case is really prohibited by the Eleventh Amendment to the United States Constitution, that such suit was premature and that exercise by the Texas Legislature of the State police power in enacting the statute in question was reasonable and lawful. These arguments and authorities are again urged in answer to this Motion to Affirm and they are incorporated herein by reference to Appellant's Jurisdictional Statement as if fully set forth here word for word.

WHO OWNS UNCAPTURED GROUND WATERS IN TEXAS?

Appellees have asserted their absolute ownership of uncaptured percolating ground waters under the lands of the Appellees Mock and wife. Texas law has not definitely been settled on this point, as is shown by the following:

(1) *Houston and Texas Central Railroad vs. East,* 98 Tex. 146, 81 S.W. 279 (1904), is a non-liability case which really announces a "right of use" and not ownership of the underground water. It holds that in the absence of State regulation the man with the biggest pump can get the water without liability for depriving his neighbor of such water.

(2) *Texas Co. vs. Burkett,* 117 Tex. 16, 296 S.W. 273 (1927), concerns ownership of "diffused surface waters" before these waters enter a watercourse. On pages 277-78, it is plain that the Texas Supreme Court is talking about percolating waters which have emerged as springs and have thus become diffused "surface waters." It is noted also that the Court talks of a "right of use" only, not a right of property in the water.

(3) *Pecos County W.C. and I.D. No. 1 vs. Williams,* 271 S.W. 2d 503, (Civ. App., 1954, Error Ref. N.R.E.), shows that the action of the Texas Supreme Court, (our highest State Court), did not approve as law the loose statements of the intermediate Court of Civil Ap-

peals as to ownership by the landowner of underground percolating waters.

(4) *City of Corpus Christi vs. City of Pleasanton,* 154 Tex. 289, 276 S.W. 2d 798 (1955), directly concerned percolating underground waters and waste thereof. The highest State Court of Texas again avoids holding absolute "ownership," and holds there is a "right of use" by the landowner with the premise that such use is subject to the police powers of the State of Texas.

In the case at bar in which Appellees keep asserting a direct and absolute property interest in uncaptured percolating water flowing, oozing and filtrating under their lands, they go directly in the face of *Williams vs. City of Wichita, Kan.,* 190 Kan. 317, 374 Pac. 2d 578, appeal dism., 375 U.S. 7, reh. den. 275 U.S. 936 (1962) which had to do with the constitutionality of the Kansas ground water statute. This law was grounded and based on the right of the State to appropriate and control "uncaptured" ground waters. Texas has done this by enacting Article 7477b, supra, the statute which is here being reviewed. The Act of the Texas Legislature could have no other effect and make any sense. By dismissing the appeal in the Kansas case, the Supreme Court of the United States has definitely confirmed the principle on which Appellant's whole case now rests . . . i.e., that the Texas statute (Art. 7477b) has to do with a "substance" res communes or res publici which is not an article of commerce until it is captured and reduced to possession, an act which the Texas Legislature declared to be unlawful if the thing owned in common (uncaptured water) is to be carried outside of the State of Texas. *Geer v. Connecticut,* 161 U.S. 519 (1895); *Canada v. Shawnee,* 179 Okla. 53, 64 Pac. 2d

694 (1936); *Hudson County Water Company v. McCarter,* 209 U.S. 349 (1908).

The Three-Judge District Court in the case at bar did not and could not hold that the water was privately owned by the landowner of the overlying land. It skirted this question with dexterity and finally announced loosely that it did not make any difference to the Court whether the percolating water had been captured or whether it was wandering aimlessly underneath the owners' land; that any attempted State action to prevent withdrawal would constitute a burden on interstate commerce whether it had become personal property or not. This point alone is of such a substantial nature as to require oral argument and consideration by this Court in order to clarify the matters and the extent of the opinion which was rendered below. If such loose statements found in the opinion below are allowed to stand, Texas Courts will not have an opportunity to pass on the substantive issues of law with regard to ownership of underground percolating water beneath the lands in the State of Texas and the District Court's errors as to substantive law in their opinion.

Since the filing of the Jurisdictional Statement in this case the opinion of the United States District Court for the Western District of Texas, Austin Division, has been printed. *City of Altus, Oklahoma vs. Waggoner Carr,* 255 Fed. Supplement 828 (1966). In order to demonstrate that there are other substantial procedural questions of law, and that the Motion to Affirm ought to be overruled and oral argument allowed in this case, Appellant presents the following matters for the Court's consideration:

I. WHAT IS A "THREAT"?

The District Court below erroneously held that the mere existence of the statute was a "threat" as follows:

> "If the officer can, by declining to act, enforce the statute, there is "threat" enough to take the suit without the provisions of the Eleventh Amendment. . . .
>
> True, the defendant has done no affirmative acts to enforce Section 2 of Article 7477b against the plaintiffs, but then he did not have to do so. The very presence of the statute itself and the possibility of its enforcement would preclude the plaintiffs from making further substantial expenditures of tax monies necessary to obtain and transport the water. . . ."

Even though we assume the correctness of past decisions which have sought to abrogate the plain intent of the Eleventh Amendment to the United States Constitution such a holding is not the law. No State is free from having its statutes questioned in Federal Courts if the declination to act, which is undisputed in this case, is a "threat." This holding destroys the Eleventh Amendment if allowed to stand.

II. WHO ENFORCES THE NEW STATUTE?

The District Court below erroneously held that Article 7477(11), V.C.S., gave the Texas Attorney General a duty to enforce Art. 7477b, V.C.S., (Motion to Affirm, page 11-12), as follows:

> ". . . this Court finds that the defendant herein meets the test set forth in Ex Parte Young in that he has 'some connection with the enforcement' of Section 2 of Article 7477b, . . ."

This is not even sound elementary law. Art. 7477b, V.C.S., was given that codification number and put in that place and Chapter, by the Vernon Law Book Company, not the Texas Legislature. Art. 7477b, in no form, shape, or fashion, amends Chapter 1, of Title 128, nor is it in any way tied to Art. 7477(11). The District Court erred in this respect because there was no "duty to enforce." See Acts of the 59th Legislature of Texas, Regular Session, Chapter 568, pages 1245-46. Attention is respectfully invited to the fact that nowhere in this new statute is there given any direction to classify Art. 7477b as a part of Chapter 1, Title 128, of the Texas law. This question of law needs consideration even in light of the tenuous avoidance of the Eleventh Amendment by some past decisions.

III. IS THE STATUTE SELF-EXECUTING?

Appellee at page 14 of their Motion to Affirm, categorically state, that Art. 7477b, V.C.S., is "self-executing." Appellant denies this statement and suggests that such a view arises because of the District Court holding in this case as follows:

> "The very presence of the statute, itself and the possibility of its enforcement would preclude the Plaintiffs from making the further substantial expenditures of tax monies necessary to obtain and transport the water. . . ."

Mere enactment of the law does not create Federal jurisdiction, for if this be the rule, no State can invoke the Eleventh Amendment. All legislation objected to by any person will be hereafter called "self-executing" and all laws of the States will be "threats" to those citizens of other States who want to disobey such laws. This substantial question of law needs oral argument and consideration in the case at bar.

IV. IS THE TEXAS STATUTE A VALID EXERCISE OF THE POLICE POWER?

In distinguishing *Hudson County Water Co. v. McCarter,* 209 U.S. 349 (1908), the Court below and Appellee overlook the opinion of this Court speaking through Mr. Justice Oliver Wendell Holmes in which the controlling issue in that case is defined as the "police power" of the State. In answering the contention that the case should be decided on the basis of the "residuum of title" that the state may have had to the water in question, the Supreme Court of the United States speaking through Mr. Justice Holmes holds as follows:

> "But we prefer to put the authority which cannot be denied to the state, upon a broader ground than that which was emphasized below, since, in our opinion, it is independent of the more or less attenuated residuum of title that the state may be said to possess.
>
> . . . But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. . . .
>
> We are of the opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs.
>
> . . . the state is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all ad-

> mit to be a great public good, and what it had it may keep and give no one a reason for its will.
>
> . . . One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."

This holding should have been the holding of the Three-Judge District Court below not based on any theory of ownership of the water in the state, but based on the broader concept that the State has inherent power to insist upon a retention of its own natural advantages regardless of ownership, private or public.

We submit that the position taken by Mr. Justice Holmes is no doubt controlling today. One need only look at the many cases decided subsequent to the *Pennsylvania v. West Virginia* case in which this Court has upheld legislation enacted by the various states to protect the health, safety and welfare of its citizens, even though the legislation placed a direct burden on interstate commerce.

Cases such as ***Hood & Sons v. Dumond,*** 336 U.S. 525 (1949), ***Pennsylvania v. West Virginia,*** 262 U.S. 553 (1923), and ***West vs. Kansas Natural Gas,*** 221 U.S. 229, can also be distinguished on one pertinent point. In cases such as these the Court always found as a prerequisite that the motivation in enacting the prohibitory legislation was to secure *"economic advantage"* for the inhabitants of the state enacting such legislation. This motivation is completely lacking in the instant legislation.

The record before this Court amply illustrates the need, and future need, of the Texas area for water.

Water is a resource that once it is expended, replacement cannot always be effected. There is no market in water. By its very nature and volume in which it is used, long range transportation is impossible. It can be judicially noticed that the lack of water can have violent disruptive effects on the health and safety of a particular geographical location as evidenced by the recent shortage of water in New York City. The fact that many portions of Texas are semi-arid and that droughts are commonplace in the Southwest has impressed the inhabitants of this State that preservation of its water transcends any economic consideration. Texas, along with other western states, has long been the leader in passing water legislation designed to protect this most precious natural resource.

The State duty to insure an adequate water supply for its citizenry cannot be disrupted. Legislation passed for this purpose is clearly within the police power of each sovereign state. The benefit sought by legislation of this type should be compared with the benefits derived from striking down legislation such as this as a burden on interstate commerce. To say that legislation of this nature places a burden on the interstate shipment of an item that has not historically been an item of commerce, and due to its physical characteristics will not likely become an item of commerce, would be a serious inroad into the power of the individual state to protect their citizens that would far outweigh the insignificant detriment to commerce between the States. That the movement of commerce should take precedence over the duty of each state to protect the safety and welfare of its citizens was never intended by the farmers of the Constitution and has not been so construed by this Court.

In support of their position that the statute here in question constitutes a burden on interstate commerce, Appellees below place sole reliance on cases such as *Pennsylvania v. West Virginia,* 262 U.S. 553, (1923) and *West v. Kansas Natural Gas Co.,* 221 U.S. 229, (1911). These cases were decided over 40 years ago and then not by a unanimous Court. Among the dissenters in each case were men such as Justices Holmes, Brandeis and Hughes, considered by most students of jurisprudence to be some of the most able legal scholars of their day. The dissenting positions in these natural gas cases is even more forceful when applied to water percolating undergound since ground water has not historically been an "item of commerce," nor will it likely become one in the future.

Mr. Justice Holmes in his powerful dissent in *Pennsylvania v. West Virginia,* 262 U.S. 553, (1923), made the following pertinent comment regarding the natural resources of a State:

> "I see nothing in the commerce clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages. If the gas were used only by private persons for their own purposes I know of no power in Congress to require them to devote it to public use or to transport it across state lines. It is the law of West Virginia and of West Virginia alone that makes the West Virginia gas what is called a public utility, and how far it shall be such is a matter that law alone decides. I am aware that there is some general language in *Oklahoma v. Kansas Natural Gas Co.,* 221 U.S. 229, 255, a decision that I thought wrong, implying that Pennsylvania might not keep its coal, or the northwest its timber, etc. But I confess I do not see what is to hinder. Certainly if the owners of the mines or

> the forests saw fit not to export their product the Constitution would not make them do it. I see nothing in that instrument that would produce a different result if the State gave the owners motives for their conduct, as by offering a bonus. However far the decision in the case referred to goes it cannot outweigh the consensus of the other decisions to which I have referred and that seem to me to confirm what I should think plain without them, that the Constitution does not prohibit a State from securing a reasonable preference for its own inhabitants in the enjoyment of its products even when the effect of its law is to keep property within its boundaries that otherwise would have passed outside. *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 357."

Even assuming, though not admitting, that the Act of the Texas Legislature is not a valid exercise of the police power, would it not be proper to assume that the Courts of the State of Texas would so find if given the opportunity to pass upon the statute.

What is the real meaning of Texas water laws in relation to Art. XVI, Sec. 59 of the Texas Constitution? Has not the Texas Supreme Court in its latest decision said that percolating waters are to be captured and used subject to the State police powers? Wherein does the State transcend the Federal Commerce clause by placing conditions on the capture of a "substance" which is not yet "property"? Can Texas act under *Geer,* supra, and *Hudson v. McCarter,* supra, to protect its water? Why does not Art. 7477b, V.C.S. constitute a change of a rule of property? These questions of law are substantial and real.

CONCLUSION

Wherefore, Applicant prays that this Court consider Appellants' Brief Opposing the Motion to Affirm, that said Motion to Affirm be overruled, that this Court enter its order noting probable jurisdiction, and that this cause be processed, heard and decided after oral arguments thereon.

Respectfully submitted,

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PROOF OF SERVICE

I, Roger Tyler, one of the attorneys for Waggoner Carr, Attorney General of the State of Texas, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of October, 1966, I served copies of the foregoing Appellant's Brief Opposing Motion To Affirm on the several parties thereto, by mailing a copy in a duly addressed envelope, with first class postage pre-paid, to each of the following Attorneys of Record in this cause:

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